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SELF-DETERMINATION AND U.S. SUPPORT OF INSURGENTS:

A POLICY-ANALYSIS MODEL

A Thesis Presented to

The Judge Advocate General's School, United States Army

The opinions and conclusions expressed herein are those of the individual author and do not necessarily represent the views of either The Judge Advocate General's School, United States Army, or any other governmental agency.

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SELF-DETERMINATION AND U.S. SUPPORT OF INSURGENTS: A POLICY-ANALYSIS MODEL

I. INTRODUCTION.

Intervention in support of insurgents and national liberation movements is one of the most difficult and controversial areas of concern both in international law and U.S. national policy. It is an area that has enormous impact on those subjects that matter most to nations: international stability and world order, national security, and the self-determination of peoples. The significance of this broad issue requires care, but also, a sense of urgency in seeking solutions, both within the international community and in our own national policy. For any state actually involved, either as one that decides to intervene or as one that becomes an unwilling host of the insurgents, the insurgency issue becomes all the more critical.

Recognizing that the specific issue of support of insurgents involves a broad spectrum of larger political, legal, and security issues is only a first step. Then come questions that at first glance appear simple, such as: What labels fit here? Should we become involved? Will our involvement help or just make matters worse? The determination of whether a state has intervened illegally in a purely internal struggle depends mainly on the facts arising out of an inherently volatile environment. The issue also runs headlong into differing interpretations of the basic principles of traditional rules of international law.

The number of on-going regional conflicts and the degree of media attention given them reflect a clear indication of the difficulty of dealing with external support of insurgents, and particularly, support of insurgents by the United States. The list of insurgencies itself proves the geographic scope of the

issue. Heated dialogues on support of rebels in Afghanistan, Nicaragua, Angola, Mozambique, and Cambodia are daily reading fare.

What is it then that causes support of "freedom fighters" and "wars of national liberation" to be such emotional issues? Certainly part of the answer lies in how often such highly charged labels are loosely attached to suit the occasion. Yet, it is precisely because these terms strive to capture genuine aspirations of people seeking peace and freedom that persons are often in sympathy with the struggle and its ideals. Just beneath the surface of all insurgency issues runs this undercurrent of concern for the human condition. This concern for basic human rights compounds the complexity of dealing with insurgency.

The problems relating to insurgency and self-determination, together, are especially intractable, not only because of the emotions they evoke, but also because of the sheer pervasiveness of their impact. They interrelate in a way that exerts stress at every major level of public international law, foreign policymaking, and national security planning. At one level, these issues cause divisions within the international legal structure as it seeks to restrict the use of force against the sovereignty of states, while protecting the fundamental human rights of individuals. At a second level, they are an independent cause of political instability and regional conflicts having the potential, ultimately, to threaten the existing global balance of power. Thirdly, insurgency and self-determination are a source of tension between the constraints imposed by traditional principles of international law on nonintervention and the wide-reaching objectives of the national foreign policy process. Finally, they are also no less a source of contention even within our own constitutional separation of powers, as demonstrated between the Chief Executive and Congress.

This thesis presents a policy-oriented analysis that examines self-determination and fundamental rights in the context of support for insurgents. The policy-oriented analysis that is the focus here is one part of a three-tiered contextual methodology. The methodology was developed by Professors McDougal, Lasswell, and Reisman and also includes both comprehensive case and legal trend analyses.[1] This thesis will first review trends in the sources of international law, world policy doctrines, and the national foreign policy debate that manifest an increasing support for individuals and peoples engaged in self-determination through insurgency. The thesis will examine current American doctrine on support of insurgents. Then, a policy analysis will suggest a model approach to national decision making that directly addresses international law, including the human rights principles that are undercurrents of United States foreign policy on support of insurgents.

II. INTERNATIONAL LAW ON THE SUPPORT OF INSURGENTS

A. U.N. CHARTER GENERAL PRINCIPLES APPLICABLE TO INSURGENCIES.

The Charter of the United Nations enshrines two great principles that have special significance for the issue of external support of insurgents. One is the principle of respect for human rights and the self-determination of peoples. The other is that of non-intervention and the suppression of aggression against nations.[2] Whether support of insurgency is either permissible or desirable in any particular situation ultimately will depend upon the relative weights one accords these principles. In light of the Charter's stated purposes, these two principles were designed to be mutually reinforcing. In the context of insurgencies and national liberation movements, striking the balance between these has become a continuing source of major controversy within the international legal community.

1. Respect for Human Rights and the Self-Determination of Peoples.

The international legal system has recognized a body of law on individual human rights and fundamental freedoms that almost immediately began to break down the distinction between a state's treatment of its own nationals, as opposed to the treatment of the nationals of another state within one's borders.[3] The substance of human rights and the right of self-determination has taken shape in the U.N. Charter, as well as numerous other general and regional instruments defining and recognizing these rights and freedoms as part of international law.[4]

The Charter's principles of ensuring equal rights and self-determination of peoples and of promoting human rights and fundamental freedoms of individuals clearly reflect the U.N.'s broad purpose of maintaining international peace and security through conformity with international law.[5] Article 55 expressly seeks, through these protections, to enhance "the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations."[6] Article 56 commits all members "to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55."[7] A brief discussion of the development of basic human rights in international law will assist in one's understanding of how self-determination relates to non-intervention.

a. U.N. Resolutions and International Declarations on Self-Determination and Human Rights.

General Assembly Resolution 2625, the Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations,[8] is one of the most authoritative statements on

the Charter principles of self-determination and human rights. Resolution 2625 defines self-determination as the right of all peoples "freely to determine, without external interference, their political status and to pursue their economic, social, and cultural development" and imposes on states the affirmative duty to refrain from any forcible deprivation of that right.[9] In opposing or resisting the deprivation of fundamental rights by a state, peoples "are entitled to seek and receive support in accordance with the purposes and principles of the Charter under the Resolution."[10]

Resolution 2625 provides some limited operational guidance in this area by imposing on states a responsibility "to promote through joint and separate action" those rights and freedoms to which peoples are entitled.[11] The resolution also admonishes states that they must respect the territorial integrity and political independence of states that are in compliance with the Resolution and must refrain from disrupting the national unity or territorial integrity of any state. The International Court of Justice has held that self-determination through the free and genuine expression of the will of peoples is a principle that may even take precedence over territorial integrity depending on the facts of a particular case.[12] Taken together, these principles imply that respect for territorial and political integrity is grounded in the presumption that fundamental protections are being provided by the state to its populace in compliance with its duty under the Charter.

The United Nations has further defined these fundamental rights in an International Bill of Human Rights under which all members are pledged to protect specific fundamental rights, including the right of all people to self-determination. Four separate instruments comprise this Bill of Rights: the Universal Declaration of Human Rights,[13] the International Covenant on Civil and Political Rights,[14] the International Covenant on

Economic, Social, and Cultural Rights,[15] and the Optional Protocol to the International Covenant on Civil and Political Rights.[16] Numerous other declarations and conventions on human rights also have been promulgated through the United Nations.[17]

Comparable to the guarantees contained in the International Bill of Rights are the provisions in regional systems for defining and enforcing human rights guarantees. The most significant of these in stature and effectiveness is the European Convention for the Protection of Human Rights and Fundamental Freedoms.[18] The European Convention established a unique mechanism for monitoring and enforcing regional human rights, which functions independently from the national courts of the member states.[19] Its most important feature is the provision permitting acceptance of petitions directly from individuals alleging violations of Convention guarantees.[20]

A second major regional human rights system parallels the European Convention model. The American Convention on Human Rights[21] is the basis for an Inter-American human rights system which has its origins in the Charter of the Organization of American States.[22] The American system reflects, notwithstanding certain differences, the broad impact the European Convention's success has had on the development of international human rights beyond its region.

A more recent example of a regional declaration on human rights is the Helsinki Accords of 1975.[23] Considered to be a nonbinding European declaration, it also includes the United States, Canada, and the Soviet Union as signatories. Among its enumerated human rights is a very broad formulation of the right of self-determination, which asserts that "all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and political status, without external interference, and to pursue as they wish their political, economic, social, and

cultural development"[24] Even though the meaning of what constitutes "external interference" was not made clear, the Western nations decried as violations of the Helsinki Accords certain forms of foreign domination by use of force that followed the Accords. After the Soviet Union's invasion of Afghanistan and the Soviet role in Poland's imposition of martial law, the 1981 Conference in Madrid convened to review implementation of the Helsinki Accords. The Conference ended inconclusively.[25] As one commentator observed about human rights violations after Helsinki, "[t]here was nothing new about human rights violations, but what was new was that governments could no longer claim that mistreatment of its own citizens was its own business."[26]

Various bilateral agreements also provide fundamental rights for individuals. Status of forces agreements between states represent one form of bilateral agreement on human rights and protections that are codified with specific enforcement provisions for the benefit of armed forces abroad.[27] Military personnel, who are subject to a host country's criminal jurisdiction, have basic human rights guarantees that are provided under the status of forces agreement. A significant example is the NATO Status of Forces Agreement[28] and its Supplementary Agreement.[29]

The innumerable international instruments on self-determination and fundamental freedoms illustrate just how well-established human rights are in international law. These agreements have thereby advanced the purpose, stated in the U.N. Charter, of ensuring respect for self-determination and human rights. In so doing, these instruments unambiguously show that human rights are the responsibility of the international community as a whole, and not just a domestic concern of the state. What has lagged behind in this development has been an organized system for enforcing these rights within the context of international law on the use of force by states.

One should distinguish, however, between recognition of the fundamental rights themselves and the ability, or inability, to enforce those rights.[30] Rights must not be conditioned on the ability to assert them. To do so would suggest that the only international persons who are legally entitled to protection are those who can enforce their rights by force against another, and in particular, against a state. Providing protection of rights to persons who need and deserve such protection is the essence of norms embodied in the Charter's purposes of enforcing human rights and self-determination and of preserving an international peace grounded in justice. The legal concepts justifying intervening force seek to enhance the enforcement of these rights.

b. Humanitarian Protection in Armed Conflict.

Although not expressly addressed in the U.N. Charter and regional instruments, a closely related fundamental right of humanitarian protection in time of armed conflict exists. This protection complements basic human rights by ensuring the health and safety of noncombatants. In international and internal armed conflict, this law of humanitarian assistance is quite well-developed. Humanitarian law embodies very specific provisions applicable under conditions of armed conflict; it operates at a time when the ordinary exercise of human rights becomes impaired by war.[31]

The Geneva Conventions of 1949,[32] and, to a lesser extent, their Additional Protocols of 1977,[33] represent affirmative humanitarian obligations under international law owed to individuals who have become victims of war. War crimes trials are one example of efforts to enforce the obligations that individuals now bear under international humanitarian law.[34] Universal jurisdiction over violators of the law of war, and over those who commit other crimes, such as piracy, hijacking, and

genocide, focus directly on the roles and responsibilities of individuals in the international community.

The humanitarian rights under the Geneva Conventions vary depending on the category of persons who have become victims of war because their own state is either unable or unwilling to provide them assistance and protect them.[35] In addition to the duties incumbent on the parties, Common Article 3 of the Geneva Conventions specifically provides a right of humanitarian initiative by an impartial humanitarian body.[36] This neutral humanitarian relief intervention on behalf of individuals is provided by governmental or non-governmental organizations, such as the International Committee of the Red Cross. The intervention is by consent of the state as a signatory of the Geneva Conventions and has become essential to enforcement and verification of compliance with humanitarian rights.[37]

Humanitarian assistance is therefore part of this larger, evolving body of fundamental rights. The general and regional declarations, conventions, and resolutions provide compelling evidence of discreet human rights, including the right of self-determination, which are recognized in international law by substantial agreement. Application of these principles by the International Court of Justice, as well as the efforts of regional systems and humanitarian relief organizations, represent significant evidence of an international standard which all states are called upon to implement and enforce.

c. Status of Individuals and "Peoples" in the International State System.

The international instruments on human rights and humanitarian assistance focus directly on individuals, or categories of individuals, according them status, protections, and responsibilities under the law. Even agreements and treaties

directed mainly at defining the jurisdictional rights of states in dealing with each other increasingly are being used to assert individuals' standing to raise the rights.[38] A common example is that states regularly recognize individual standing to raise personal rights in extradition treaties, most notably in those provisions dealing with the political offense exception when an act of terrorism or subversion is alleged.[39] The overall effect has been to accelerate recognition of individuals as subjects of international law. "The canard that individuals are not subjects of international law," Professor Sohn has concluded, "no longer has any basis. It is generally accepted that individuals now have clear rights under international law and various remedies to secure their observance."[40]

Under the traditional view, the state is the exclusive subject of international law and is a distinct entity that is carefully defined.[41] The evolution into an international state system was based on the premise that all fundamental change takes place among states and in the context of state-initiated action.[42] Although they do not necessarily have the same capacities as states, numerous entities, such as self-governing territories, non-self-governing dependencies, international organizations, intergovernmental consortia, transnational corporations, peoples, and individuals, have all steadily acquired recognition as being embued with various rights and duties under international law.[43]

Self-determination as a human right of individuals is principally applied in the context of the political status of identifiable groups, or peoples. The international and regional instruments that have been discussed all suggest the common characteristics that constitute a certain people. These revolve around their distinct economic, social, or cultural identity. A "people" often has some relationship with a territory, even though sometimes they are displaced from it. The most difficult aspect of defining what comprises a people has been the controversy of

national liberation movements (NLMs) that claim to represent peoples. The difficulty lies in making the determination of which particular political NLM is actually entitled to the status of representative. The Palestine Liberation Organization, for example, sits as a full observer in the General Assembly[44] and actively participated in the Diplomatic Conference on Humanitarian Law in Armed Conflict, which adopted the Additional Protocols to the Geneva Conventions. Concerning other NLMs, the General Assembly also has delegated authority to recognize representatives who will serve as observers to regional organizations.[45]

This issue of who is a proper subject for protection as a "people" paradoxically has become an obstacle to constructive efforts at ensuring self-determination and humane treatment of peoples. As the law struggles to distinguish between popular democratic movements and radical opposition groups, the labels "freedom fighter" and "terrorist" have become interchanged carelessly. The same 1985 General Assembly resolution that reaffirmed the right of self-determination also purported to condemn all acts of terrorism as criminal conduct. The Resolution is widely viewed, however, as permitting an exception for terrorist violence in national liberation struggles against colonial domination, alien occupation, and racist regimes.[46] "Wars of national liberation" refer generally to armed conflict in which peoples are engaged in resisting the forcible suppression of their right to self-determination as a people.

One example of the difficult issues that national liberation movements generate is presented in Protocol I to the Geneva Conventions, which, as discussed previously, provided additional humanitarian rights to noncombatants.[47] In addition to supplementing those rights, however, Protocol I also explicitly raised wars of national liberation to the level of international armed conflicts. This was done to provide additional protections (and obligations) under the law of war.[48] But, as Abraham

Sofaer has noted, "Never before has the applicability of the laws of war been made to turn on the purported aims of a conflict."[49] The criticism implied by that statement is that the just cause criteria for engaging in armed conflict, common in the pre-Charter justifications of use of force, has now simply resurfaced in the guise of fulfilling self-determination under the Charter to the detriment of minimum world order. This view of wars of national liberation, however, inhibits the development of responsible articulations and principles under international law by which to determine when forcible deprivations of self-determination and human rights has occurred, what kind of support a people is entitled to if such deprivations have in fact occurred, and how such determinations should be made.

As to the status of entities other than states that might be able to assert rights under international law, a group in armed opposition to an established government traditionally could rise to the status of belligerent only if it met certain defined criteria. Thus classified, it could then assert an international status that imposed a legal requirement of neutrality on third states in their relations with the two combatants.[50] Insurgents, on the other hand, historically had no internationally recognized status, rights, or duties. The need to resolve the issue of international legal status for insurgents initially arose when a foreign state was sending assistance to the insurgents,[51] or when a substantial portion of the country either supported or was controlled by the rebels, thus posing a serious challenge to the existing government. Although an insurgent group might never achieve de jure status as a government, it could be regarded as having achieved limited international status, such as that reflected by the capacity to conclude international agreements concerning specific territory under insurgent control.[52]

U.S. policy concerning the criteria for recognition of the Afghan resistance as a provisional government provides a current

application. The United States informed the Afghan guerrilla leaders that they would have "earned recognition from the international community" once the provisional government demonstrates "control of territory, consent of the people, capacity and willingness to exercise international obligations, [and] possession of a civil administrative apparatus that can govern."[53]

2. The Principle of Nonaggression Against Nations

a. The Renunciation of Aggression as an Instrument of National Policy

In addition to respect for fundamental human rights and the self-determination of peoples, the second important principle of the U.N. Charter applicable to the support of insurgents is the principle of nonaggression by one state against another. The concepts of nonaggression and self-determination have an inherent tension between them. Nonaggression is primarily, although not exclusively, a principle protecting the sovereign authority of the state within its territory, including its sovereignty over its people, from all external influences adverse to the interests of the state. Article 2(4) of the Charter imposes an obligation on all states to refrain from "the threat or use of force against the territorial integrity or political independence of any state" in the conduct of foreign affairs.[54] Article 2(4) is the culmination of a long history of development of a concept that abandons the use of force as an instrument of national policy.[55] This prohibition on the use of force inherently includes a prohibition on aggression.

The term "aggression," however, has never been fully defined. Despite the long and diligent efforts that underlie the attempt to define aggression,[56] Professor Stone concluded that the term would remain somewhat uncertain in its meaning for three basic reasons.[57] The first is that defining the term would have the perverse effect of limiting its applicability as a

prohibition. States would interpret the definition to serve their own national interest and this would, in turn, diminish both its usefulness and its ability to adapt to the ever-changing circumstances in which conflicts arise. The global experience, Stone suggested, has proven that literal interpretations of definitions of aggression have often been used to circumvent the drafters' intent. The second reason is that aggression is an inherently ambiguous concept because of its reference to intent, a human attribute that the state entity does not have. The result is that aggression, as applied to states, has come to directly signify a judgment of innocence or guilt. Finally, as Professor Stone observed, use of the label "aggression" in most cases constitutes a conclusion about the political relations of nations drawn in the context of all history, "the final interpretation of which, in turn, lawyers can scarcely know, while historians ever debate it."[58]

On the other hand, many scholars, including Professor Brownlie, recognize that while one can evade almost any definition of aggression, such general statements are indispensable, considering the fact that states have accepted rules on the use of force that presume certain values prohibiting aggression.[59] No magic language will keep states from acting on interests they perceive as vital,[60] however, that alone is not a valid reason to abandon the search for a definition. Ultimately, whether or not a satisfactory definition can be found becomes a relatively insignificant point because the real difficulty arises when trying to determine actual facts of a particular conflict, not whether the facts fit a particular definition.[61] In general, three broad categories of aggression define the means by which states may significantly affect the interests of other states: armed aggression (direct military force), indirect aggression (covert acts against the civil government, such as by aiding resistance movements), and economic or ideological attacks.[62] The focus in the context of state support of insurgency is primarily on indirect

aggression as a violation of traditional principles of international law.

The definition of aggression also has been the subject of United Nations resolutions and declarations. An example is Resolution 2625, the Declaration on Friendly Relations and Cooperation Among States. Under the resolution, no state may take any action aimed at either the total or partial impairment of the territorial integrity or national unity of another.[63] States must employ peaceful means in the resolution of disputes consistent with the purposes and principles of the Charter.[64]

Resolution 3314,[65] The "Definition of Aggression" resolution, makes any first use of armed force prima facie evidence of aggression,[66] which, unless adequate justification for the act can be shown, becomes a breach of international responsibility.[67] Resolution 3314 adopts a definition of aggression that goes beyond the use of armed force to include other acts directed against the territorial integrity or political independence of another state in a manner inconsistent with the Charter's purposes.[68] The resolution lists certain acts that constitute aggression,[69] but also indicates other cases in which the use of force is lawful.[70]

In its definition of aggression, Resolution 3314 specifically includes in Article 3, "[t]he sending by or on behalf of a State of armed bands, groups, irregulars, or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to the acts listed above, or its substantial involvement therein."[71] Although it prohibits all forms of aggression, Resolution 3314 also very explicitly states that its definition of aggression does not preclude the exercise of the right of self-determination, the right of peoples to struggle against forcible deprivation of freedom and independence, nor the right to seek and receive support in the struggle.[72]

An apparent inconsistency therefore exists under Resolutions 3314 and 2625. On the other hand, certain peoples have the right to overthrow repressive regimes and to receive some degree of external assistance in achieving self-determination, as viewed from the perspective of those peoples. On the other hand, such external "support" provided by a state must conform to the general prohibition on interfering with the territorial integrity and political independence of another state. The apparent inconsistency really can only be resolved by returning to the basic Charter purposes that originally contemplated self-determination and state sovereignty as being mutually reinforcing principles. Any other formulation would effectively embrace one of the principles to the exclusion of the other. Therefore, if the right to receive support in seeking self-determination is to retain any meaning under Resolutions 3314 and 2625, certain forms of external assistance that are otherwise defined as direct or indirect aggression may be permissible if they are provided in support of a people struggling for self-determination. We should consider next exactly what forms of external support are acceptable under current restrictions on aggression.

b. The Prohibition on Intervention and the Use of Force

Under customary international law and the law of the U.N. Charter, the restrictions on aggression find application in the general duty of nonintervention by states. The Charter addresses the prohibitions on intervention most emphatically in Article 2(4), which prohibits the unlawful threat or use of force. Other general international instruments have explicitly affirmed this prohibition, while routinely emphasizing the interrelated purposes of protecting the sovereignty and political independence of states, on the one hand, and ensuring respect for equal rights and the self-determination of peoples, on the other.[73]

Historically, international law defined intervention as an unlawful act interfering with the political independence and fundamental freedoms that were mostly, if not exclusively, part of internal conditions within the control of the state. Nonintervention contemplates a state's exercise of a right to govern free from all external coercion or interference by other states.[74] This self-government was among "the sovereign prerogatives," encompassing "the supreme authority to control all persons and things within a state's boundaries."[75]

The post-Charter system seeks to continue this principle that one state does not intervene in the domestic affairs of another, in part through Article 2(7) of the U.N. Charter, which states that "[n]othing in the present Charter shall authorize the United nations to intervene in matters which are essentially within the domestic jurisdiction of any state. . . ." Respect for the territorial integrity and the political independence of neighboring states provides a degree of stability between states that contributes to international peace and security. Ideally, nonintervention also helps preserve the rights of a state's populace. Where a state is actually fulfilling its obligation under international law to protect the human rights of its own nationals, the populace of that state receives general protection under law from any external interference with those rights by other states.

The roots of nonintervention also run deeply through regional instruments, paralleling the principles of respect for human rights and self-determination as they appear in the U.N. Charter. This is particularly true in the Inter-American documents to which the United States has been a signatory, most notably, the very broad statement of principle in Article 15 of the Charter of the Organization of American States.[76] The renunciation of the threat or use of force expressly appears in the OAS Charter[77] and in Article 1 of the Rio Treaty.[78] The OAS Charter and the Rio Treaty, both of which the United States

has signed, rest on the fundamental assumption that "the solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy."[79]

Despite widespread consensus on the existence of this duty of nonintervention, jurists do not agree on the prohibition's meaning or the extent of its applicability. Far less consensus exists in the actual practice of states, which, apart from principles of law, also reflects such diverse policy motivations as the balance of power, competing ideologies, and humanitarian concerns.[80] Whether nonintervention as a rule protecting the sovereignty of states retains enough vitality to prevail in practice depends on the capacity of law to cope with these competing factors. "Specifically," one authority has observed, "it is in the international law of internal war that the simple doctrine of nonintervention is held to have received a challenge to which it cannot effectively respond."[81]

These "internal wars" become a visible expression of grievances that often are alleged by the insurgents to be a failure of the state to satisfy its fundamental obligation to protect the rights of nationals within its authority. Typically, an emerging entity makes it demands on the established government and makes appeals abroad for external support.[82] If the demands represent grievances that appear to the international community to be substantiated, then pressure for intervention mounts because human rights, a key component of international law under the Charter, are apparently being violated. The paradox under traditional law is that while the conflict itself has not been internationalized, the underlying cause is recognized as having international dimensions under equally well-established international law.

The applicability of nonintervention principles therefore should be viewed in a context broader than just the relations of states. As the significance of state sovereignty has declined somewhat, relative to emerging international entities such as "peoples," nonintervention principles have also had to take cognizance of these other entities.[83] Nonintervention, therefore, has had to evolve as one part of the larger process by which international law increasingly recognizes the rights of individuals, peoples, and national movements. This often occurs accompanied by an erosion of the principle of inviolability of state sovereignty.

c. Use of Force Options and the Levels of Conflict.

Intervention as a concept embraces a wide range of options involving varying degrees of external pressure being applied by the intervening state. Post-Charter international law particularly seeks to control the use of force, which is a severe and destabilizing form of intervention.[84] Scholars generally agree that in addressing the use of force, the Charter refers to "armed force."[85] The use of force, or just the threat of force, tends to foreclose the various lesser options lawfully available to influence state behavior, even when the purpose of the force is carefully limited.[86] The Charter system of controls combines specific restrictions under the Charter with vestiges of the pre-Charter law on aggression under customary international law.

The result is an elaborate structure of multilateral and unilateral response options tailored to various situations.[87] Whether these response options involving the use of force are legal should be measured by objectively reviewable criteria. This presumably would dispense with the need to subjectively evaluate an intervenor's intent.[88] Even if an intervention by force could be examined objectively, however, the motivations of the principal actors would still be relevant to those decisionmakers who might

be called upon to respond.[89] State policymakers constantly attempt to determine each other's motives in order to anticipate actions. The motives are then interpreted as policy objectives and thus acquire practical significance by influencing reactive decisions.[90]

The legitimacy of force as an option at any level of conflict depends on such factors as the recognized international status of the actors, the type of provocation to which the use of force responds, and the nature of the force employed. The lawfulness of intervention to support insurgents focuses initially, under traditional international law, on whether the conflict has risen to an internationally recognized level.[91] International law sought to isolate internal, domestic conflict until a rebellion essentially forced itself on the international community by establishing a new entity. At that point, rights and duties of third party states had to be reallocated.[92]

That category of conflict, now referred to as low intensity conflict, includes two of the three traditional levels of armed conflict. If the conflict were still in the initial stage, it was characterized by internal disruptive actions, generally regarded as typical criminal activity, to which domestic law would be applied. The next level is insurgency in which there is military organization by the insurgents and perhaps some de facto control of territory, although still lacking at least some of the criteria required for full international status as a belligerency. If the rebel forces receive substantial support from, or are controlled by a foreign state, that state would then be responsible for an act of indirect aggression in violation of the Article 2(4) prohibition on the use of force.[93]

With respect to the third level of low intensity conflict, the practice of recognizing formal belligerent status has declined.[94] The line distinguishing internal conflicts from those of an

international character also has become less distinct for reasons that are closely tied to the increased recognition of humanitarian law and human rights.[95] The lawfulness of the use of force in support of insurgents will therefore depend initially on the insurgent group having attained at least some degree of international status, either under the traditional rules of statehood and sovereignty, or under the developing standards recognizing other international persons and fundamental rights. Nonetheless, under traditional principles any third state military aid to, or control, over rebels opposing the constituted government is almost always considered to be an unlawful use of force, absent a sufficient justification and the employment of proportionate means of force. Former Secretary of State Dean Rusk, as the honoree of a law professor's workshop on internal conflict and insurgency support, commented on this central issue now confronting international law:

> Older distinctions between internal and international wars seem to be melting away because of the direct or indirect involvement of other nations in internal conflicts. Just as human rights are now no longer a purely internal affair, it may be that internal wars must become a matter of concern to the community of nations because they so frequently affect the possibilities of organizing a durable peace.[96]

The principles of fundamental rights and lawful use of force, therefore, are uniquely and inextricably intertwined in the area of wars of national liberation. The challenge of controlling the use of force, while seeking to protect fundamental human rights on the basis of objectively reviewable standards, is of increasing practical significance to the continuing vitality of international law. What measure of success that has been achieved in defining aggression as a limit on state conduct under the rules on the use of force should similarly provide direction in meeting the challenge of establishing an analogous set of criteria for defining self-determination as a limit on state conduct.

B. JUSTIFICATIONS FOR INTERVENTION IN INSURGENCIES.

Legal bases for the lawful use of force have been employed with differing degrees of support and acceptance by legal authorities. The justifications generally derive either from the principles of the U.N. Charter system or from interpretations of customary international law. Among these justifications are the rights of self-defense by either individual or collective action, protection of nationals, invitation of the recognized government, counterintervention, and humanitarian intervention.[97]

1. Individual or Collective Self-Defense.

Article 51 codifies a right of individual and collective self-defense subject to the principles of the Charter and the U.N. system of dispute resolution.[98] The right is triggered by an "armed attack," a term which has specialized meaning when applied to the support of insurgents. External support of military and paramilitary forces still may constitute a threat or use of force that violates Article 2(4) without rising to the level of an armed attack. If so, Article 51's right of self-defense would not apply.

The definition of the phrase "armed attack" was a significant issue before the International Court of Justice (ICJ) in 1986. The court held that the United States was engaged in an armed attack against Nicaragua through the extensive arming and training of the anti-Sandinista rebels, known as <u>contras</u>.[99] The ICJ also held, however, that assistance to rebels in the form of providing weapons or logistical support <u>alone</u> does not necessarily constitute an armed attack.[100] For that reason, the ICJ held that the Sandinista government's support of insurgents in El Salvador, Honduras, and other Central American countries did not constitute an armed attack. Therefore, the United States' use of

force, that did amount to an armed attack was not a justifiable response under self-defense.[101] On the other hand, the court held that lesser forms of support, such as the military maneuvers of the United States near the Nicaraguan border and the supply of funds to the contras, did not constitute a "use of force" against Nicaragua.[102]

Article 51 explicitly acknowledges the "inherent right" of self-defense against armed attack. This inherent right has been interpreted as referring to a broader pre-existing right of self-defense against aggression under customary international law.[103] A contrary, more restrictive view has been presented, represented by Professors Brierly and Brownlie, who observed that the Charter structure was intended to give the United Nations a "near monopoly" on the use of force, and that therefore, Article 51 should be limited by Article 2(4)'s stricter prohibition.[104] Professors McDougal and Feliciano concluded that an independent right of self-defense against the use of force still exists, but the degree of necessity and proportionality required under customary international law are no less restrictive than the Charter's limitation on self-defense against armed attacks.[105] This latter view essentially prevailed in the ICJ.[106]

The right of self-defense against armed attack has additional significance with respect to the international legal status of insurgents engaged in internal war. Article 1 of the "Definition of Aggression" Resolution (Resolution 3314) defined aggression as "the use of armed force by a State against the sovereignty, territorial, or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations . . . [emphasis added]." According to an explanatory note that accompanies the article, the term "State" is used "without prejudice to questions of recognition. . . ."[107] The right of self-defense at times has been asserted against entities not formally recognized as states. Indeed, basic world community

policy on competence to defend against aggression does not depend on formal recognition of statehood. This is particularly true under traditional principles where a newly organized territorial body or two distinct territorial units are involved, so long as the international community perceives the entities as being relatively permanent.[108] Since a right of self-defense may be asserted against an entity not fully recognized as a state, it follows by implication that such an entity might similarly be entitled to invoke the right. The extreme situation under this argument would be that a third state, rather than invoking its own right of self-defense in support of insurgents, might assert a claim of engaging in collective action to vindicate the emerging entity's right of self-defense.

The traditional principles on the right of self-determination contrast with a recent, expanded concept of collective self-defense articulated principally by Professor J. N. Moore.[109] The Reagan Administration unsuccessfully offered collective self-defense as a partial justification for its support of the Nicaraguan contras.[110] The concept, as enunciated by Moore, is designed to identify those uses of force in low intensity conflict that pose an actual threat to the security of neighboring countries in a region. The right would apply where the force falls short of an armed attack that would trigger the traditional right of self-defense. This view of the right of self-defense seeks to strike at the increasing instances of "covert wars," in which a revolutionary regime secretly trains and deploys guerrilla forces against established governments of other states while publicly denying using force in order to preserve its own rights and protections under the Charter.[111] Moore's expanded concept of collective self-defense has been highly controversial, both as an academic position and as matter of policy.[112]

Collective action under Chapter VII of the Charter, including the right of collective self-defense under Article 51, is not as

strictly confined to the prerequisites of customary law as is individual self-defense.[113] A relevant reminder of how post-Charter law continues to develop is that even the now clearly established right of collective self-defense had to evolve through a period of controversy over whether the "self" in self-defense could ever provide to other participants any right to use force that they did not already have on their own.[114] Through the example of collective security, McDougal and Feliciano provide insight on this process of changing community norms and the policy decisions the process affects:

> A "legal concept" of self-defense, like any other concept, can be given empirical reference only in terms of who, for what purposes and under what conditions, uses and applies the concept. The expectations both of the general community and of particular authorized decisionmakers about lawfulness (that is, reasonableness) do and must change through time as the conditions of use and application change.[115]

2. Protection of Nationals.

The right of a state under international law to defend its nationals may include a limited right to protect one's nationals in a foreign state.[116] Some authorities dispute that a lawful basis for such intervention exists.[117] The United States is among the minority of states that asserts the justification.[118] The side one takes on this issue broadly depends on the extent to which one recognizes protection of nationals as a matter of legal necessity associated with either the theory of self-defense or the theory of humanitarian intervention, a separate justification to be examined in detail later. This justification applies to the situation in which the host nation's government has failed in its duty to provide adequate protection against imminent physical danger and alternatives short of the use of force would be ineffective.[119] Permissible action includes direct military force, but only by using that degree of force, for that period of time, reasonably

necessary to ensure the safety or removal of one's own nationals.[120]

The limited nature of this form of intervention under a narrow interpretation probably would preclude its use as a legitimate means of providing support to insurgents, even if one's nationals are present and operating within the general field of action. This is because such action normally would exceed the scope of the rescue purpose. Any additional arms, equipment, and military personnel inserted during the operation beyond that needed for the rescue mission would constitute unlawful excess force. In addition, the presence of nationals being rescued cannot have been the result of a previous unlawful intervention designed to create the pretext of a rescue. This implies that personnel serving as trainers, advisers, or combatants with insurgents in the field are either inappropriate subjects for lawful intervention by rescue, or must already be lawfully assisting the insurgents under a legal basis for intervention. The availability of another legal basis for intervention, of course, would simply negate the need to use rescue as a justification to support insurgents.

3. Intervention by Invitation.

Uncertain and contradictory authority exists on the issue of whether intervention is permitted on behalf of an established government at the specific request of that government.[121] One position is that the invitation may be accepted until full belligerency status is accorded the principal parties in civil war, at which point, the strict neutrality rules became applicable.[122]

The rationale in favor of permitting intervention by invitation relates to an absolutist view of sovereign rights of state authority over the internal conflict; the matter simply did not involve a right or duty under international law.[123] The validity

of this traditional position prevails today, but only regarding sovereign police authority to enforce domestic law and order during internal disturbances short of insurgency. International law permits, and the United States remains committed to, demonstrations of support to friendly nations through security assistance to control domestic disorder.[124]

The emerging legal trend now runs against this traditional doctrine.[125] A rule permitting intervention on behalf of the government in power during an insurgency does not enhance a goal of isolating the domestic conflict to prevent a widening of hostilities. In one sense, however, the distinction as to whether the conflict is purely internal or is externally supported is likely to be of minimal significance in most situations because of the international dimensions that so-called internal wars increasingly have on their own. Intervention by invitation is often at odds with the international goals of preventing external domination and of ensuring the right of a people to establish for themselves their political independence and a representative form of government.[126]

The decline in legal authority for intervention on behalf of the government fighting against insurgents corresponds to the gradual deemphasis of state sovereignty as the exclusive focus of world order. Self-determination expressed as a coequal principle under post-Charter international law at least requires that the external use of force not be permitted to tip the scales against a pluralistic, representative government--whether one in existence or one in the making. What is lacking under the traditional rule is a means by which to determine objectively whether intervention on behalf of a nonrepresentative government is violating this duty of states to refrain from forcible action interfering with a people's legitimate struggle for independence.

Another reason exists for the decline of intervention by invitation as a legal basis. Under classical interpretations of customary international law, no corresponding right of intervention (or right of "counterintervention") was permitted to other foreign states offering support as requested by the insurgents. As a result, there was no offset for the foreign support being received by the government. This became a further obstacle that was imposed against self-determination by a one-sided rule denying counterintervention in favor of insurgent groups. That rule, to be examined next, is also undergoing change under international law.

4. Counterintervention in Support of Insurgents.

Post-Charter developments[127] in the area of insurgency counterintervention are especially relevant to international law and inter-bloc foreign relations.[128] An expanding body of literature advocates the right of counterintervention in support of insurgent forces in those states where a foreign state has already intervened on behalf of the established government.[129] The arguments take several forms and, for the most part, presuppose intervention by invitation to be an insufficient legal justification for the initial intervention.

One view considers counterintervention to be an inherently permissible international sanction in response to an unlawful initial intervention.[130] The conflict in Afghanistan is one example of what may be characterized as unlawful intervention at the invitation of an Afghan government installed by the Soviet Union from the outset.[131] In the absence of any United Nations sanctions, the right of counterintervention would accrue to the members of the international community. The absence of an effective international remedy, such as counterintervention, would promote greater disorder by allowing unrestrained adventurism

that violates even the most fundamental prohibitions on the use of force.[132]

The right of counterintervention, according to another and more controversial perspective, is not really intervention at all. This position focuses on Article 2(4)'s qualifying phrases on the prohibition on uses of force "against the territorial integrity or political independence," and "in any manner inconsistent with the Purposes of the United Nations." In effect, this right, by promoting the objectives of discouraging disorder, and by helping to ensure self-determination and fundamental rights, simply accomplishes that which the Charter itself seeks to achieve.[133]

All of these interpretations purport to employ lawful force in a manner that is not exclusively reserved to the United Nations enforcement mechanism, thereby preserving the right of states to counterintervene in insurgency both collectively and unilaterally. The right to counterintervene in insurgency must be limited to a necessary and proportional response to a prior illegal use of force by a third party state.[134] The requisite necessity and proportionality also suggest that the right of counterintervention in insurgency should not be construed to permit a use of force by the counterintervening state against the territory of the state that first intervened illegally.[135]

5. Humanitarian Intervention.

The most consistently controversial justification for intervention on behalf of insurgent groups has been intervention for humanitarian purposes. Humanitarian intervention has often been denounced by legal authorities as being essentially unlawful under all circumstances at all times.[136] Others point to the long historical development of humanitarian intervention in natural law and analytical jurisprudence, recognized by international legal scholars from Vattel and Grotius through Oppenheim and

Lauterpacht, and continued by the humanitarian principles of the U.N. Charter, the Universal Declaration of Human Rights, and the stream of post-Charter human rights instruments.[137]

One controversial aspect of humanitarian intervention is that abuses tend to offset the humanitarian benefits by posing a greater threat to world order, at least in the short-term. The list of historical abuses associated with humanitarian intervention is long. One of the most notorious examples of attempting to justify the use of force by claiming humanitarian intervention was the Nazi invasion of Czechoslavakia in 1939, which was purportedly carried out to protect "the life and liberty of minorities."[138] The United States has opposed, officially at least, this type of justification because of its potential for abuse.[139] The justification routinely requires a degree of factual inquiry and a final judgment that is frequently difficult, and sometimes impossible, due to the lack of reliable information and the shortness of time for decisionmaking. The notorious cases, however, show that misuse of the humanitarian intervention justification is at least identifiable by the international community as an abuse of recognized norms.

Many states seem willing to consciously sacrifice the Charter goal of promoting minimal human dignity and justice in favor of minimal world order and avoidance of force in international relations.[140] Certainly the potential dangers of abuse call for well-defined criteria limiting humanitarian intervention. This concern and the unwillingness of states to accept a curtailment of their sovereign independence are the principal motives for state opposition to the doctrine. The practice itself continues, however, because it appears to be indispensable as an exceptional measure in emergency situations.[141] The following limiting criteria delineate the circumstances under which humanitarian intervention would be lawful:

1. a specific, limited purpose of alleviating a grave threat to human rights,

2. a limited duration sufficient for the purpose of the mission,

3. a limited use of force necessary and proportional to the mission, and

4. a lack of any reasonable alternative action.[142]

A major reason for the persistence of claims of humanitarian intervention is that the justification is grounded in the law on fundamental freedoms and the evolution of those principles. The same legal forces raising the need for greater emphasis on fundamental freedoms also diminish respect for the authority and legitimacy of governments responsible for repression. Humanitarian intervention, as a limited exception to Article 2(4), would be for the specific purpose of remedying serious and pervasive human rights abuses, using the minimum force necessary to accomplish that objective.[143] The right of self-determination and the enforcement of human rights would thus limit the claims of sovereignty by states already violating such a crucial international norm as that which protects the peoples those states represent.

C. THE CONTINUING SEARCH FOR PRINCIPLED DISTINCTIONS IN THE LAW.

Difficult problems apparent in any study of insurgency are the level of the conflict and the uncertainty in the applicable rules of international law. Two conflicting principles under the U.N. Charter, of equal importance, are both trying to prevail: one prohibiting intervention and the use of force against a sovereign state, and the other dedicated to ensuring human

rights and self-determination of peoples.[144] The prohibitions on unilateral intervention have become less absolute because post-Charter law, which was originally contemplated as a security mechanism that would have obviated the need for unilateral measures,[145] has not been sufficiently effective.

The democratic states traditionally have not claimed a right to use force in support of democracy or human rights, however. They normally have invoked, instead, other justifications for their uses of force. Professor Schachter attributed this restraint to Article 2(4).[146] Humanitarian intervention was not a justification claimed by the United States in Grenada. The Grenada intervention, however, suggests something more about Article 2(4), and so do Nicaragua and Afghanistan. What they demonstrate is that there is an increasing tension that exists between the articulated reasons for policy decisions and the actual reasons for the actions taken.[147]

The extent to which Article 2(4) in fact represents an accepted restraint under customary international law is, and will remain, an open question as one considers the actual uses of force by states and the lack of community response to breaches of Article 2(4).[148] The Charter also explicitly says self-determination and human rights are international norms to be protected. Resolution 2625 particularly emphasizes, not just the right to self-determination, but also a right to assist peoples struggling for self-determination. This leads to a moral and practical dilemma. Although Professor Moore does not endorse humanitarian intervention as a justification for the support of insurgents, Professor Paust credits him as having observed that to do nothing in a given situation also may be to intervene. "Thus," says Paust, "the realistic question might not be whether to intervene but how."[149] These factors suggest a need to examine whether an alternative interpretation of Article 2(4) might

better serve the Charter's goal of creating the conditions essential for international stability and well-being.

Between sovereignty and self-determination, the evolving intervention theories still have not reached the point of equilibrium. The consensus that does exist on insurgency and the limits of Article 2(4) actually leaves external support weighted in favor of preserving the inviolability of state sovereignty.[150] It protects the existing government by not being willing to confront the underlying issue of the desire for self-determination by the governed. On the results of this tension between sovereignty, under the traditional rules, and self-determination, as an emerging influence, Professor Sohn provided the following observations:

> The emphasis in the United Nations in later years on the self-determination principle led it to a point of saying that it is not only permissible, but even desirable, in fact necessary, for countries to come to the assistance of national liberation movements if they are fighting for the liberation of their country from foreign colonial domination or occupation by foreign forces. But even this approach does not go so far as to say that, simply because a government which is neither a foreign occupier nor a colonial government is oppressive, that [another] government is entitled to help the people liberate themselves.[151]

One can at least conclude that a limited degree of consensus exists in principle on the need for action to remedy genocide, apartheid, slavery, racism, and the unequal treatment of peoples generally.[152] Professor Sohn, however, overlooked liberation from racist regimes, which are regimes not necessarily of foreign origin. The latter serve as one example of a purely internal source of instability with a potential for international significance. Whether peoples under oppressive domination, foreign or domestic, will actually be able to achieve political independence and stability for themselves under this limited approach without substantial external involvement is doubtful. In support of this

conclusion, one need only examine the extensive military support needed to force an end to the Soviet occupation of Afghanistan.

Even in situations involving a foreign occupier, international law is still struggling to articulate distinctions between such relatively straightforward situations as Afghanistan and Grenada. As Michael Levitin observed, the Afghans shot back and the Grenadians did not.[153] This states the difference somewhat simplistically, but it does recognize an important distinction between the two conflicts. "To distinguish between lawful and unlawful interventions," Levitin concludes, "the international community ought assign juridical significance to the [affected] state's citizens."[154] Such a distinction is entirely consistent with the protection of a people's right to self-determination. Intervention must be governed by an objective standard, but the free exercise of that right by the people themselves must be viewed through their eyes.

If self-determination as a coequal principle is to have any meaning in the law on support of insurgents, it at least has to consider the legitimacy of a government in power, as viewed in the same way the people themselves perceive their government.[155] The issue becomes whether a use of force has been applied against the political independence of a government that has its legal basis grounded in the will of the governed. The issue also involves such factors as the status of the governed as a people, and the pervasiveness of state repression against fundamental freedoms.

As a criteria of lawful or unlawful use of force, the human factor ultimately is neither more vulnerable to abuse nor less susceptible to objective assessment within the international community than other justifications that also must be tested against necessity and proportionality. Lawrence Pezzullo, former ambassador to Nicaragua and Uruguay, believes that the

international community and the United States have proven they can successfully achieve self-determination for peoples through peaceful resolutions to internal conflicts. But, he warns, achieving stability in internal disputes that have reached crisis proportions depends on accommodating a process of popular reform; "[h]ow one overcomes the question of legitimacy is important to the attitude that will affect American decision-makers faced with that type of crisis situation."[156]

III. DOMESTIC CONSTRAINTS ON U.S. POLICY IN SUPPORT OF INSURGENTS

Much of the criticism currently directed against United States policy on the support of insurgents stems from the perception that greater weight is accorded the constraints and exigencies of political realities than to a concern for the principles of international law.[157] The controversies surrounding the withdrawal of the United States' consent to jurisdiction of the International Court of Justice in the Nicaragua case and the disclosure of funds secretly diverted to the contras illustrate this widespread perception. A clear implication from both events is that international law is but one of many significant elements that affect the decisions of our foreign policymakers.

The relative emphasis indeed seems to be on factors other than international law. In the area of insurgency support, U.S. policy particularly seems to be guided more by domestic constraints and our own view of our political position in the world. The purpose of discussing these issues here is to consider what those domestic political and legal constraints are, how they compare with the constraints of the international legal structure, and how the domestic constraints can be made to interrelate with the emerging principles of international law.

A. CONTEMPORARY POLICY DOCTRINES ON THE SUPPORT OF INSURGENTS.

1. The Process of Policymaking.

One of the gravest concerns about U.S. support of insurgents is the potential for becoming militarily committed to a futile expenditure of national resources resulting from a lack of well-conceived policy decisions. In the combined crush of international events and domestic concerns under which foreign policy decisions must be made, the interrelation of law with events often slips from view. The decisionmaker typically must first identify the problem and make an initial assessment of its nature. The response by the decisionmaker involves certain expectations--expectations about the political or military power available to implement policy; the potential costs, including the destructiveness of a possible use of force; the effectiveness of achieving goals in compliance with the discernible rules of law; and, the likelihood of organized world community intervention in response.[158]

One then begins a problem solving approach designed to seek out the expertise and resources needed to meet the crisis. The more compelling the threat, the more ad hoc the process may become. As the urgency increases, so too will the immediate response more directly reflect the exclusive perspective of the people whose views or expertise have dominated the process. The longer the crisis lasts or the more frequently it recurs, the less likely the policymaker will be to anticipate and prepare for the next problem of a different character.

A former senior State Department official has commented on the tendency to isolate staff legal counsel from decisionmaking on matters of what he refers to as "high politics" and "high policy."[159] He described the problem this way:

> Particularly since the latter part of the nineteenth century, the efforts of diplomats and states to establish clear norms for the conduct of international relations in [their] "ordinary affairs" have been remarkably successful. . . . Yet there is another dimension to U.S. foreign policy where international law rarely receives more than peripheral consideration. Crisis management, high-stakes political and economic conflict, and national security policy attracts constant and visible attention from senior decisionmakers who weigh domestic politics and foreign policy in the face of heavy public scrutiny. Their political calculations rarely invoke international law as a principle guide to action.[160]

"Crisis diplomacy" is characterized by reacting to events only after they occur. It was the same intractable dilemma facing an American president nearly twenty years ago, after he had promised to eliminate reactive decision making from the foreign policy process of a nation then deeply embroiled in a foreign war of insurgency. On December 2, 1968, then President-Elect Richard Nixon, introducing his choice of Henry A. Kissinger as Assistant for National Security Affairs, charged him with this task of regaining control over a reactive policy process.[161] From that point, Kissinger began to institutionalize a conceptual framework of strategic thought that remains a major part of foreign policy planning today.

In his earlier writings,[162] Kissinger had emphasized the importance of thinking conceptually in foreign policy because the sheer complexity of technical problems had out-paced the bureaucratic process. Each problem, he said, was dealt with on its own merits, emphasizing details at the expense of the larger conceptual framework. This in turn, he concluded, has led to a lack of purposefulness and flexibility in dealing with regional conflicts. Both sides of the conflict, in his view, must understand not only what national interests and risks one's own side has at stake, but those of the other side as well. Limited wars especially must have well-conceived strategic objectives that necessarily have, not only a military focus, but a political

dimension as well.[163] This requires that a decision to use force complement the goals of both aspects.

2. The Balance of Power Theory.

The classic expression of the historical lesson that no world order is safe without physical safeguards against aggression is the search for stability through a balance of power.[164] International order under this concept recognizes an indispensable relationship between power and security, on the one hand, and morality and legitimacy (meaning general acceptance), on the other.[165] The central idea is that no one of these principles is sufficient alone to preserve the world order.

The balance of power among states themselves cannot preserve international stability without a basis of political legitimacy, because revolutionary dissatisfaction will become inevitable. People tend to evaluate foreign relations and foreign policy in terms of their own domestic standards of justice. Thus, the legitimizing principles on which the international order is based must be broad enough to encompass a general acceptance of community values to ensure that state relations do not ultimately return to an exclusive reliance on the use of force.[166] There is also likely to be a gap between the realities of international power and domestic expectations about a national foreign policy. The statesman must be able to obtain the support of a domestic consensus on the legitimacy of the underlying principles that can embrace a realistic balance of power.[167]

The balance of power theory is consistent with post-Charter principles designed to control reliance on the use of force. The theory seeks to protect the status quo against external attempts to alter it unilaterally through the "illegitimate" use of force by either direct or indirect means.[168] The Charter principles are effective as a basis for world order only so long as the principles

may be interpreted in a way that preserves their perceived legitimacy and also enables the attainable international consensus to be achieved domestically.[169]

The use of force and human rights in the Central American insurgencies provide a current example of the need to reconcile these principles with domestic and international perceptions of what constitute legitimate policy objectives. President Reagan's Commission on Central America, the Kissinger Commission, observed that two basic U.S. goals are potentially in opposition in the region: the need to defend fundamental security interests, and the promotion of respect for democratic government and human rights.[170] Purely indigenous reform movements, even indigenous revolutions, should not pose a problem of policy for the United States.[171] Externally supported insurgency can become a threat to both security and to democratic reforms, however. A successful U.S. policy on insurgency, like an effective rule of international law, can and must be able to reconcile these two values in a way that will make them mutually reinforcing. Restraints on force and respect for human rights, therefore, are widely perceived to be equally legitimate norms, from both a domestic and international perspective.

The critics of the balance of power theory believe that the key to stability in international politics does not lie in military power, but rather, in other sources of power.[172] This view explains instability in terms of changing populations, increasing political organization, and economic development--the same factors associated with rising nationalist movements.[173] Regardless of whether the balance of power theory is adequate to explain the sources of instability, it has proven to be a widely influential conceptual framework useful in limited respects, and must be applied with an adequate appreciation of its limitations.[174] As will be seen later, this balance of power concept provides the

underpinnings for the Reagan and Brezhnev Doctrines, which specifically affect current policies on insurgency support.

3. Soviet Doctrine on Support of Wars of National Liberation.

One of the greatest challenges to international law has come from the Soviet Union and its Eastern European client states, often referred to as the Second World.[175] Only gradually, in recent years, has the Soviet Union begun to accept traditional principles as customary international law. This acceptance, however, has been highly selective, permitting the Second and Third Worlds the opportunity to band together in various General Assembly resolutions to make new law on key issues, including insurgency support.[176] All three worlds agree that international law protects human rights, especially where large-scale violations occur. Notwithstanding the Helsinki Accords,[177] there is still more support in the First World for the recognition of individual rights.[178]

In light of state practice, however, the consensus is less clear. Under the justification of the Brezhnev Doctrine, the Soviet bloc nations have imposed and maintained communist regimes through the occupation and control of Eastern Europe and Afghanistan, and have directly intervened by force to encourage and support wars of national liberation in Africa, Asia, and Latin America. The Soviet bloc has supported Third World revolution and radical movements to fulfill its presumed international duty of advancing the world cause of Marxism.[179] This has long been viewed as a global threat, from the U.S. perspective, to the balance of power and world stability.[180]

Significant signs of a Soviet reversal on the Brezhnev Doctrine, however, have been observed in some specialized studies over the last decade by those scholars who see grave

Soviet doubts about the continued wisdom of linking radical nationalistic aspirations with Marxist ideals.[181] A Soviet policy reassessment, it has been said, has led to a shift in which the Soviets will continue to provide economic aid, training, and, to a lesser extent, military assistance.[182] One no longer hears expansive promises of military and economic support for the so-called 'liberated countries, which now must pursue development "mainly through their own efforts."[183]

Some evidence of the need for the Soviet Union to rethink its own criteria for the support of insurgency lies in the irony that established pro-Soviet Marxist regimes have themselves come under indigenous insurgent attack that forced Soviet-backed troops into counterinsurgency roles in Afghanistan, Nicaragua, Angola, Mozambique, Cambodia, and Ethiopia.[184] According to this view, there also exists within the Soviet experience on the support of insurgents a lesson for the United States in the same area:

> Moscow is revising its ambitions because of the demonstrable failure of its political and economic model for guiding, changing, and dominating the Third World. Although it has a few military footholds in the Third World--mainly through its military assistance--these are not enough to ensure lasting influence. By contrast, U.S. economic power, cultural openness, and tolerance of political diversity have long been our greatest assets. If our competition with the Soviet Union is conducted on these grounds, rather than on military grounds, we have nothing to fear, except perhaps our own poor judgement.[185]

If the Soviet Union's focus is indeed moving away from anticipating the inevitability of world-wide military struggle between the communist and capitalist nations, there remains the question of how the United States and its allies will respond to the shift.[186] The first step is to verify that the evidence establishes an actual substantive strategic change, rather than indicating mere tactical rhetoric.[187] The next step is to reduce our reliance on the balance of power's view of world order that

sees all Soviet gains as American losses. This could tend to lead us into an unnecessary, reactive use of military force in localized conflicts.[188]

4. The Reagan Doctrine on Support for Freedom Fighters.

The Reagan Doctrine on the support of those insurgents fighting to regain democratic control of governments from communist dictatorships is more than a mere refinement of primarily defensive containment policies under past presidential doctrines.[189] President Reagan, in effect, announced the policy during his State of the Union Address of February 6, 1985. As early as 1981, however, commentators had perceived, even under the Carter Administration, a new U.S. willingness to set aside post-Vietnam insecurities and revive preparedness for Third World military intervention as a policy option.[190]

The Reagan Doctrine was basically developed as a response to the Brezhnev Doctrine, which seemed to put Marxist regimes beyond democratic challenge no matter how unrepresentative of popular will.[191] One criticism of the Reagan Doctrine is that it commits the United States to promises of military support that have no natural limits.[192] This has not proven to be a significant problem in practice because the Reagan Administration has exercised some restraint, for example, by resisting pressure to initiate U.S. support for rebels in places such as Mozambique and Angola.[193]

The Reagan Doctrine has also been characterized as an "American Brezhnev Doctrine," equally violative of international law. At least to the extent that the policy is directed at totalitarian regimes and offsetting Soviet-initiated interventions in internal conflicts, the appellation is actually flawed in its analogy. In those particular situations where Soviet power is being projected abroad to impose or to secure Marxist regimes against

national self-determination, the use of force in counterintervention would be a lawful response to Soviet external aggression under counterintervention as a justification.

Another potential justification for the Reagan Doctrine is that of humanitarian intervention. Humanitarian intervention was offered as an initial, but later muted, legal basis for the Reagan Doctrine.[194] In his 1988 State of the Union Address, President Reagan invoked American support on behalf of freedom fighters everywhere in what he broadly described as a "global democratic revolution."[195]

A different criticism levelled against the Reagan Doctrine is that it has a single-minded focus on anticommunism that has concentrated its application to Marxist totalitarian regimes and virtually ignored the universal desire for freedom from all forms of tyranny.[196] This concern was alleviated in large part in early 1986 by the President's more even-handed statement to Congress promising to "oppose tyranny in whatever form, whether of the left or the right."[197]

Former Secretary of the State Cyrus Vance, writing in 1986, used Afghanistan as an example of a conflict in which the United States properly aided the insurgents because the intervention clearly promoted a balanced approach to both human rights and U.S. interests.[198] "It is critical to note that in supporting the Afghan rebels," he added, "Americans are not merely supporting an anticommunist rebellion. The United States is vindicating universal principles of international law and helping the Afghan people to determine their own future."[199] As Vance also warned, "Americans must recognize that anticommunism cannot always be equated with democracy."[200] Anticommunism alone does not justify support to insurgents, nor does the pursuit of democracy and human rights always justify American use of force.[201] Yet, self-determination and human rights should never be off the political agenda. It is on this basis, rather than by force, that

we can best distinguish what the United States has to offer the world from the Soviet's aggressive, totalitarian alternative.[202] The focus must remain, however, on alleviating such repression and forcible external domination.

President Reagan has repeatedly defended the lawfulness of the doctrine. "Support for freedom fighters is self-defense," President Reagan said in his 1985 State of the Union Address. It was less a literal statement of the law than an expression of how the law should be able to serve certain basic national policy interests, including security needs. In its continuing search for principled distinctions, international law has had to strive to overcome its own perception problems concerning its relevance to state policymaking in the area of insurgency intervention.[203] One commentator has said that the perceived need for a greater degree of responsiveness to political logic and security imperatives may underlie part of the resistance to post-Charter rules on nonintervention.[204] The Reagan Doctrine generally reflects this view that, in the conduct of international affairs as a whole, intervening force is an indispensable means of protecting rights and achieving order.

Although the Reagan Doctrine invokes moral principles that are consistent with the emerging international law on the use of force in counterintervention and humanitarian intervention, the administration's articulations of the doctrine seem calculated overall to bridge a perceived gap between law and policy. The gap appears widest in the particularly difficult area involving human rights. By failing to recognize the significance of humanitarian concerns in the law on intervention, as it is already afforded in other expressions of international community norms, international law has failed to maintain its essential congruency with its own moral basis.[205] The natural consequence is that, in the absence of collective remedies, the United States and other states increasingly begin to act unilaterally to assist

self-determination and protect fundamental human rights, while the external decisionmakers articulate their own justifications.[206] As Professor Reisman has observed, "[t]he international political system has largely accommodated itself to the indispensability of coercion in a legal system, on the one hand, and the deterioration of the Charter system, on the other, by developing a nuanced code for appraising the lawfulness of individual unilateral uses of force."[207] If it has achieved nothing more, the Reagan Doctrine has at least served notice on the international order that the United States will not stand idle in the face of externally supported repression.

B. U.S. DOMESTIC LEGISLATIVE CONTROLS ON INSURGENCY SUPPORT.

U.S. national interests are circumscribed to a significant degree by the domestic legislative controls on insurgency support, security assistance, and covert activity. Michael Matheson, in his position as a State Department legal adviser, has pointed out that domestic legislation represents certain practical considerations that must be taken into account in foreign policymaking in the area of intervention.[208] First, a government that is considering foreign military support must work generally within the confines, not only of international law, but also domestic laws and procedures.[209] Second, military assistance relationships can be, and often are, used to apply leverage ensuring compliance with international norms, particularly those norms on human rights and humanitarian conduct.[210]

U.S. policymakers, and Western governments in general, also undergo intensive lobbying pressure from numerous international human rights interest groups, such as Amnesty International, Americas Watch, Helsinki Watch, and others. The impact of these groups combines with the efforts of various influential national human rights organizations, as well as with the nonpolitical

activities of national and international relief organizations. The result is that national policy tends to reflect this international and domestic concern for human rights. The United States should recognize, however, that the pursuit of human rights norms in foreign policy is actually very much consistent with its own national values and interests.[211]

1. Current Congressional Legislation and Oversight.

Congress has enacted an extensive framework of legislative restrictions and oversight mechanisms designed to control the use of military force abroad. While it is beyond the scope and purpose of this article to analyze these in detail,[212] the more significant elements will be identified for a discussion of a trend in domestic law toward increased humanitarian aid in support of insurgents.

a. The War Powers Resolution.

The most well-known and controversial congressional attempt to legislatively restrict the use of force by a president, the 1973 War Powers Resolution,[213] was itself precipitated by U.S. involvement in an undeclared insurgent war. The purpose of the resolution is to ensure presidential notification to Congress before the introduction of United States "armed forces into hostilities or into situations where imminent involvement in hostilities is clearly indicated by the circumstances." After every such introduction [the President] shall consult regularly with the Congress. . . ."[214] The reporting requirement then triggers a sixty-day time limit (extended an additional thirty days for "unavoidable military necessity respecting the safety of United States Armed Forces") within which time the President must terminate the engagement of forces, absent a specific enactment by or armed attack on Congress.[215] No authority for such introduction of U.S. armed forces shall be inferred, except under

specific authority of U.S. law permitting the introduction of forces into hostilities or implementing treaty provisions to that effect.[216] The same section defines those forces to include members used "to command, coordinate, participate in the movement of, or accompany the regular or irregular military forces of any foreign country or government. . . ."[217]

Despite presidential protestations, no U.S. president has actually challenged the constitutionality of the War Powers Resolution by actually refusing to make reports, and in fact, they have grudgingly provided carefully worded reports "consistent with" the resolution.[218] The resolution does strike at the heart of the separation of powers between the executive and legislative branches in the area of foreign policy, declarations of war, and the duties of the commander-in-chief.[219] The constitutional dispute between the executive and legislative branches is one that the judiciary prefers to side-step as a political question.[220] For the foreseeable future, the War Powers Resolution represents a significant constitutional foothold for Congress in the area of presidential discretion to use U.S. forces to support irregular military forces in a foreign country.

b. Security Assistance Legislation.

Military aid and security assistance are the means by which Congress routinely controls U.S. military support abroad through its firm grip on the power of the purse. This body of domestic legislation consists principally of the Foreign Assistance Act (FAA),[221] the Arms Export Control Act (AECA),[222] and annual budgetary legislation, including the defense and foreign assistance authorization and appropriation acts. The FAA is the most significant statute on security assistance because of the comprehensive grant programs it provides. The AECA limits the sale and transfer of defense articles and services abroad, prohibiting grants or trades apart from the specific grant

programs. The AECA specifically prohibits U.S. personnel from performing any defense services of a combatant nature.[223]

Emphasizing the significance of security assistance legislation, Matheson made this observation:

> These pieces of legislation make it quite clear that assisting foreign countries in providing for their internal security is a proper object of United States security assistance. In the context of these statutes, internal security refers to violence of an internal character above the level of ordinary law enforcement tasks. However, other statutes place restrictions on situations in which such assistance may be provided. The most prominent restriction is in the area of human rights.[224]

Security assistance programs are lawful under traditional principles permitting assistance to established governments for the purposes of providing security from external aggression and providing police enforcement to quell the lowest category of internal disorder. As seen in the previous discussion on external support to states requesting assistance, this foreign assistance to a state generally remains lawful until an internal disorder has reached the point that an insurgent group challenging the constituted government has achieved some degree of internationally recognizable status.[225]

In contrast to the support of a government, under the traditional principles of international law, there is no authority for security assistance programs specifically providing military aid to an opposition group at any level of internal conflict. What has become an increasingly common practice, however, is the rendering of security assistance to a friendly government in a state that is either sympathetic to, or actively assisting insurgents fighting in a bordering state. Consider in this regard the following statement by Assistance Secretary of State Elliot

Abrams, characterizing U.S. aid to Honduras as an augmentation of contra support:

> Our assessment is that we can and must help the democracies to develop through economic and security assistance, but that only pressure applied directly to Nicaragua can produce gains that will decrease the risk of Soviet and Cuban domination of Central America. If we are correct in this assessment, and experience suggests that we are, then the alternative to our current two-track policy of support for the resistance and negotiations would be to further shore up Nicaragua's neighbors against Sandinista aggression. The alternative approach would be very difficult and would carry at best limited assurances that it could work.[226]

The grant programs under the FAA are administered by the Department of State under Title 22, to ensure consistency with broader U.S. foreign policy objectives. The FAA specifically contains human rights provisions that are designed to restrict the situations in which military aid can be provided.[227] Section 660 prohibits training and support of foreign police forces and is designed to preclude U.S. assistance to foreign police forces practicing internal repression.[228] This provision was originally aimed at states other than those established democracies with no standing army and which had no history of human rights abuses. Another key provision of the FAA, section 502B, requires, subject to suspension of aid, that security assistance be provided in a manner that encourages compliance with international human rights in the state receiving the aid.[229] Matheson points out how the human rights provisions under the FAA have wider significance beyond U.S. policy:

> Although this is just one national model for a description of the circumstances and limitations on involvement in foreign violent situations, it is a particularly relevant one for use, and should be considered as a starting point for the development of international standards in this area.[230]

Apart from issue-specific restrictions,[231] there are certain country-specific provisions that may fall into one of two categories. One category completely prohibits security assistance

to Marxist[232] and radical[233] regimes.[234] Another category, which is found in various legislation,[235] restricts full participation by certain countries,[236] particularly in Latin America. The latter restriction is often is often in response to a country's history of domestic repression.[237]

These restrictions on security assistance embody institutionalized policy judgments on human rights and other factors that similarly influence our decision on whether to support particular insurgent groups. Some of the same policy factors that cause the United States to withhold support from certain regimes may also cause the United States to provide, in other situations, military assistance to certain insurgent groups. Pressure for U.S. assistance to the Renamo guerrillas in Mozambique illustrates how a government's identification as Marxist can become the policy basis for insurgent support. These legislative restrictions on security assistance also indirectly benefit insurgent groups where a government might otherwise have been eligible for U.S. weapons and training. The government that has lost that source of assistance has also lost the potential to apply greater force against its insurgents.

Suspension of aid to a supported government, however, as Matheson observes, would be a very difficult practical problem because it would never be viewed by that government as a neutral political act. This would be true even if the suspension were for human rights violations. He adds that the same factors that initially produced the support would still be at work as an inducement to stretch the facts or legal rationale for continuing the assistance.[238] This simply recognizes the probability that external support to a government fighting insurgents will likely continue during a full-scale insurgency, leaving the insurgents with only a plea for counterintervention or humanitarian relief from repression.

The United States should be doubly cautious, under international and domestic law, about providing counter-insurgency support to a government that may have committed serious human rights abuses. The United States has proven in El Salvador the enormous pressure that exists for continuing support to a friendly government. This is especially so when support seems justified by regional instability believed to be caused by other third state involvement and when human rights progress in the friendly state is being certified by the executive branch. Were the facts otherwise, the United States might be obliged, under both international and domestic law, to withdraw security assistance. Suspension would be required even if the suspension would give the appearance of supporting the insurgent group.

c. Oversight of Intelligence Gathering and Covert Activities.

It has been observed that international law provides no basis for distinguishing between overt and covert use of force, which are both subject to the same rules.[239] There is a significant difference as a practical matter and states frequently prefer covert action as the best means of protecting national interests.[240] For the United States, the difference is not only significant, but divisive. The underlying issue is the appropriateness of covert activity being conducted by democratic governments.[241] The serious dimensions of the issue have been painfully evident in the national debate on the secret sale of arms to Iran and the diversion of the proceeds to the contra rebels.

Covert action, primarily through the Central Intelligence Agency, became a key part of the Reagan Doctrine's challenge to Marxist-Leninist states around the world.[242] In his analysis of factors over the last decade that have made it more likely that major covert operations will become public, Gregory Treverton[243]

has observed that more openness in U.S. policy actions "would reflect the reality that, as the century ends, national boundaries are more and more permeable."[244] A major policy concern is whether the United States, in assuming responsibility for the groups it supports in covert actions, is associating itself with the enhancement of democracy and the larger cause of human rights. If so, this provides an important safeguard against reactions to the covert activity when the covert action becomes generally known.

Congressional oversight is an important constraint on U.S. covert action. Legislative restrictions on intelligence gathering and covert actions come in different forms affecting support to insurgents in a variety of ways. The oversight process has given Congress, through its respective intelligence committees, much more knowledge of and control over the operations and expenditures of all U.S. intelligence agencies than ever before.[245]

In the same year that the War Powers Resolution was passed, Congress further affirmed its intent to be actively involved in foreign commitments by passage of the Case Act.[246] The Case Act requires prior State Department approval of any international agreement and subsequent transmission of the text of the agreement to Congress within sixty days.

Congressional efforts to further tighten reporting requirements in the oversight of intelligence gathering and covert action continue with renewed vigor, in part a direct consequence of U.S. support of insurgents in Nicaragua.[247] A major focus of the Congressional hearings on the contra support was the apparent violation of the funding limitations contained in the Boland Amendment.[248] The Boland Amendment provided funds to the CIA, but prohibited their use for military equipment, training, advice, or other military support to any paramilitary

group whose purpose was to overthrow the Nicaraguan government or to initiate a military confrontation between Nicaragua and Honduras. Funding limitations have been used by Congress in the past to restrict support of other insurgencies. One of these was the Clark Amendment that prohibited support to insurgents in Angola.[249] The Congress initiated the repeal of the Clark Amendment in 1985. This repeal was followed by requests for aid to the resistance movement.[250]

d. Special and Emergency Executive Authority.

An immediate source of assistance available in special emergency situations may be employed at the personal direction of the President. Specific provisions to this effect exist in both the FAA[251] and the AECA.[252] These are very limited exceptions to the normal budgetary process, with certain reporting requirements to Congress. Within the narrow confines of action permitted, which include dollar amount limitations, defense equipment and services can be made available abroad.

Another type of executive authority which the President has exercised to provide indirect support to insurgents is the expanded use of combined training and emergency deployment readiness exercises.[253] The most obvious intent of this form of support is not to inject American personnel, arms, or equipment into hostilities, but rather to provide a timely show of strength and support for the defense of a friendly government, particularly in emergency situations. If that friendly government has been sympathetic to insurgents in a neighboring state, then the U.S. deployment exercise would at least indirectly benefit the insurgents.[254]

2. Humanitarian Assistance and Civic Action Legislation.

Humanitarian assistance legislation by Congress is a very wide-ranging area that addresses many of the basic human needs that increasingly are being recognized as a responsibility of the international community. The legislation is a domestic reflection of one important aspect of the growth of that body of international law on human rights, as discussed.[255]

Humanitarian assistance and civic activities cover a variety of projects that are flexible enough to be programmed into the mission of nearly any type of military exercise. These too, however, are strictly controlled activities under current statutes and the Comptroller General decisions on training and military construction performed during combined exercises.[256] In the past, such assistance was provided under agreements between the Defense Department and the Agency for International Development under the Economy Act.[257]

Recently enacted legislation has increased Department of Defense authority to engage in more activities involving humanitarian assistance and civic action. The Stevens Amendment to the Department of Defense Appropriations Act of 1985[258] provided the first statutory authority to use Defense Department funds for humanitarian assistance and civic action. Current statutory limits on humanitarian and civic assistance permit activities that are authorized in conjunction with military operations where funds are specifically appropriated for specific humanitarian purposes. An exception is provided for unplanned but incidental and commonplace humanitarian assistance involving minimal expenditures. Annual notice to Congress and regular coordination with other agencies are also required by these same legislative provisions.

The expanded use of Defense Department resources in what has been the province of other agencies, demonstrates the perceived link between the social and economic sources of instability and the origins of insurgency.[259] This expanded authority on humanitarian assistance does not abrogate the Department of State's principal responsibility for the administration of foreign aid programs consistent with the overall objectives of U.S. foreign policy.

Congress has also played a direct role in this area by actively participating in the use of humanitarian assistance legislation as an instrument affecting support of insurgents. One of the most difficult and protracted legislative battles between the executive and legislative branches has been the recent struggle over humanitarian assistance and so-called "nonlethal aid" to the Nicaraguan resistance forces. The House of Representatives succeeded in passing legislation that mandated a cut-off of funds for military support to the contras, effective at the end of February 1988.[260] The Reagan Administration prepared and pressed for passage of a specific package of humanitarian assistance funding as an alternative. That aid package was procedurally blocked due to opposition to the proposed funding, which would have provided nonlethal materiel and equipment that could be used for combat purposes.[261] Part of the success of the Democratic Party in opposing that humanitarian assistance was attributed to a promise by its leaders that they would pass a substitute humanitarian assistance package for the contras. The substitute package of humanitarian assistance, consisting only of funds for food, clothing, shelter, and medical care was eventually offered, but it too was defeated.[262] Even the manner in which these requests for nonlethal aid were defeated did not reflect reluctance by a majority in Congress to providing humanitarian aid to an insurgent group as a matter of general policy. The debates instead revolved mostly around the composition of the aid and how it was to be delivered.[263]

This was borne out later when a negotiated truce was concluded on March 24, 1988, between the Nicaraguan government and the resistance leaders. Negotiators for both sides agreed that aid decisions by Congress had achieved the intended effect of pushing the two sides to the settlement that was reached.[264] The agreement included terms explicitly permitting contra acceptance of humanitarian aid. It was assumed that this aid would consist mainly of food, uniforms, and medicines, to be provided through a neutral third party. In the United States, leaders of both parties promised to provide renewed humanitarian aid for the rebel forces pending negotiation of a final settlement.[265]

Similar issues revolving around continued U.S. lethal and nonlethal aid to the Afghan resistance temporarily stalled progress on the Soviet's negotiated withdrawal.[266] American military and humanitarian assistance to the mujaheddin during the past year was reported to be more than $600 million dollars.[267] The Soviet Union strongly voiced its opposition to a U.S. demand for a "symmetrical" cut in aid to the Afghan government and the guerrillas. The Soviets raised the argument that their assistance from one recognized government to another should not be equated to U.S. clandestine aid to insurgents.[268]

U.S. legislation providing humanitarian aid to insurgents has also included relief for the victims of war.[269] This responds to a related, yet distinct, need for continuing U.S. humanitarian relief for the victims of these conflicts.[270] The established international right to provide and to receive neutral humanitarian aid should not be obscured by the issue of humanitarian assistance designed to support insurgents. These examples of humanitarian assistance to insurgents, however, are significant because they reflect the extent to which third state humanitarian assistance and nonlethal aid to insurgent groups has come to be viewed as an acceptable practice, at least from the perspective of

U.S. policymakers. These developments particularly demonstrate that Congress has gradually become a willing partner with the President in providing humanitarian support directly to insurgents.

IV. FORMULATING A POLICY APPROACH TO U.S. SUPPORT OF INSURGENTS.

A. SOURCES OF U.S. NATIONAL INTERESTS AND DOMESTIC CRITERIA FOR INSURGENCY INTERVENTION.

A number of noted policymakers have made major contributions to the issue of when U.S. foreign policy should include the use of force and what domestic standards should apply. That dialogue is especially important now. The national debate in some ways has tended to focus more on the broad, universally applicable principles of aggression and intervention, rather than on the policy concerns tied to concrete national interest.[271] A proper balance, however, must be struck between the formulation of general criteria for intervention and the specific national interests to be served.

1. U.S. National Interests as Policy Objectives.

The central thread of the Reagan Administration's policy on the use of military force, according to former Secretary of Defense Caspar Weinberger, has been one which sought to combine sufficient military strength with a clear determination to employ it against any attack on our vital interests so that we might eliminate the benefits of, and ultimately deter, aggression.[272] A credible deterrent policy must take into account the finite nature of U.S. resources in both human and material terms. The United States must therefore realign its defense commitments to match the limits of American capabilities.[273] On

the use of American military force, Weinberger recommended the following specific domestic criteria:

1. That the vital interests of the United States or its allies be at stake;

2. That we be able to commit sufficient numbers with adequate support to win;

3. That we clearly define the military and the political objectives;

4. That we continually reassess and adjust objectives and forces as necessary;

5. That we have "some reasonable assurance" of the support of the American public; and,

6. That we first exhaust the available diplomatic, political, and economic alternatives.[274]

"The caution sounded by these six tests for the use of military force is intentional," Weinberger added. "The world consists of an endless succession of hot spots in which some U.S. forces could play, or could at least be imagined to play a useful role."[275]

Secretary of State Shultz also has observed that, although the use of military force will remain an indispensable aspect of responding to the conflicts that persist in the world, the United States "should not engage in a military conflict without a clear and precise mission, solid public backing, and enough resources to finish the job."[276] Shultz added, however, that certain situations also would arise that call for a discreet or limited use of force that falls short of a full national commitment.[277]

Others have voiced the same note of caution sounded by Weinberger on the need to balance national interests and the deterrence of global aggression. One scholar on American policymaking has described the goal this way:

> Although we should try to prevent increases in Soviet power by supporting those who resist it, it would be

> counterproductive to pursue even this general interest at all costs, anywhere, anytime. To do so would weaken our ability to actually intervene where and when it matters most. Our interests cannot all be of equal importance. We must have priorities and defend our interests selectively.[278]

Other commentators similarly have asserted that the failure to establish realistic foreign policy priorities carries serious potential consequences that have led inexorably to the nation's current problems of strategic overextension and economic deficits.[279]

2. Domestic Criteria for Insurgency Intervention.

A well-known set of criteria for the use of force specifically in insurgencies has been proposed by Representative Stephen J. Solarz. Solarz affirms the need to "stay within accepted international norms whenever possible."[280] He also sees a need for selective intervention and a growing general recognition that the United States has significant values to protect in certain internal and regional conflicts abroad. Complete American passivity in the face of Soviet violations of those accepted norms, he says, would be "neither politically practical nor strategically prudent."[281]

Solarz would agree that the first question is whether the proposed aid serves our own national interests.[282] He emphasizes that, although anticommunism and the pursuit of democracy and human rights are still distinct and important foreign policy objectives, the final decision should be based on the direct national interests of the United States and not solely on ideological imperatives.[283]

That statement echoes the opinion of former Secretary of State Vance, who emphasized that the pursuit of fundamental freedoms and human rights in U.S. foreign policy is still compatible with the pursuit of U.S. national interest.[284] "In a

profound sense," wrote Vance, "America's ideals and interests coincide, for the United States has a stake in the stability that comes when people can express their hopes and build their futures freely."[285]

With national interests as the policy goal, Solarz offers six key questions to be addressed when determining whether assistance to a particular insurgency actually is in the national interest of the United States:

1. What are America's central policy objectives in the area in question?
2. What is the best way to achieve U.S. objectives?
3. How do America's friends in the region view U.S. support for the insurgency?
4. How closely tied to the Soviet Union is the regime that the insurgency is challenging?
5. How likely are the insurgents to achieve their goals with and without American aid?
6. Would achievement of the resistance's objectives significantly improve life in the country and advance U.S. interests?[286]

Applying his test, Representative Solarz mentioned only Afghanistan, Cambodia, Angola, and Nicaragua as worthy of consideration for U.S. support.[287] Although Solarz underscored the preeminence of national interests in his standards, these six criteria have been criticized for having the effect of raising other factors to the same level of importance as the most vital American interests. By requiring that all six of the elements be satisfied, factors that are not matters of American vital interest have been presumed by some commentators to be just as significant under the Solarz criteria as those that are vital interests.[288] According to that criticism, the United States realistically has very few tangible interests that compel extensive political, much less

military involvement, in the Third World where most insurgencies occur.[289] Even if accurate, this criticism of the Solarz test would have significance only if the sum of the criteria regarding a particular insurgency would result in intervention mainly for ideological reasons.

Various legal authorities have also reinforced and elaborated on the U.S. national interests and the standards to be applied for intervention in insurgencies. Among those commentators is Lloyd Cutler,[290] who has offered the following specific criteria:

> 1. Whether the threat to U.S. vital interests is serious enough to sustain public consensus on a policy that may put American lives at risk;
> 2. Whether sufficient financial and logistical resources are available to deliver enough support to have a real effect on the conflict's outcome;
> 3. Whether American armed forces are likely to become drawn into a protracted, direct combat role;
> 4. Whether the use of covert assistance would be an implicit admission of illegality when ultimately discovered;
> 5. Whether the action is "likely to provoke a shooting confrontation" between the superpowers; and
> 6. Whether the side we support in the conflict differs significantly in its respect for the human right of democracy.[291]

All of these various articulations of U.S. national interests involved in the decision of whether to use force and the domestic criteria on insurgency intervention complement each other well. They provide a reasonably complete picture of what national interests are to be evaluated as part of the policymaking process. Any U.S. foreign policy issue would be better served by the application of these standards regardless of the circumstances surrounding the support of freedom fighters. The need remains,

however, to assemble these domestic criteria on support of insurgents into a more systematic policy process that also takes into account the constraints of international law.

B. A POLICY-ANALYSIS MODEL FOR U.S. SUPPORT OF INSURGENTS.

To avoid drifting into the trap of crisis-oriented policymaking, the on-going national dialogue on policy objectives and criteria for intervention in support of insurgents must always be viewed in the broader scope of international law as well as global political realities. The separate elements represented in the policy-analysis model to be proposed here are intended to achieve three major purposes in the area of support for insurgents. The first is to obtain as much of a domestic consensus as possible on U.S. policy objectives, which should be based on essential national interests that are defined at the outset. A second purpose is to emphasize the need to recognize insurgencies, national liberation movements, and internal conflict in pursuit of self-determination and fundamental rights, as independent sources of geopolitical instability and regional conflict, distinct from interstate forms of aggression. The final purpose is to clearly place the discernible principles of international law among the factors to be considered in the decisionmaking process.[292]

These domestic, geopolitical, and legal aspects affecting U.S. policy can be assembled into the following systematic approach that suggests specific progressive steps to be taken in the policy process:

1. National Policy Decision on Objectives. A national policy decision on the objectives and interests to be served in the support of an insurgent group should be made at the outset. It should be made by weighing our direct, tangible national

interests. It should also include the less direct, ideological identification we have with democratic self-determination in opposition to repressive totalitarian regimes.

2. Application of Domestic Criteria for Insurgency Intervention. The domestic criteria for insurgency intervention would be applied next. This involves an analysis of alternative means offering a substitute to the use of force. The domestic criteria for insurgency intervention would be applied as a way of determining whether the proposed action would actually serve the intended U.S. policy objectives.

3. Compliance with U.S. Domestic Law. A decision to support an insurgent group that has passed the tests of national interests and domestic criteria for intervention must be capable of being implemented through operations that conform to domestic law. This must be a conscious factor applied in the initial executive decision on whether and how to support a particular insurgent group.

4. Conformity to a Cognizable International Legal Standard on Intervention. The search for a principled and cognizable rule of international law applicable to support of insurgents is an on-going process in itself. But as Professor Reisman notes, "[I]n the meanwhile, rational and responsible decisions will have to be made in the many cases that continue to present themselves."[293] Reisman concludes that in making these decisions, policymakers will have to keep clearly in view the basic and enduring community objectives that the use of coercion must serve: contemporary world order and fundamental human dignity.[294]

What then happens when vital national interests and the domestic criteria on intervention strongly endorse insurgency support regardless of the traditional principles of international

law? As a general matter, international law accommodates the exigencies of national security by its emphasis on protecting the territorial integrity and political independence of states. The right of self-defense is the main example, even aside from an expanded concept of self-defense in response to covert attack.

International law, however, is still seeking an equilibrium between protection of state sovereignty and respect for fundamental rights. Additional demands, more or less noble, may intensify the domestic pressure for intervention on behalf of presumed freedom fighters. When national interests and the domestic intervention criteria carry policy measures beyond the traditional, albeit not-so-bright, lines of international law, crucial warning signals should flash for a variety of practical policy reasons. Any step farther down the same path toward intervention should be well-considered and firmly grounded in an articulable and defensible standard of law.

National policymakers would enhance, therefore, domestic and international support for policy actions in any insurgency to the extent their decisions adhere to those particular post-Charter international norms that are clearly established. Where the perceived political realities make conformity to traditional principles of international law impossible, other discernible and principled guidelines on the use of force are continuously evolving, especially in the areas of counterintervention and humanitarian intervention. For the reasons already discussed, humanitarian intervention and counterintervention against external aggression will become increasingly significant as these two emerging principles continue to develop their own objectively reviewable criteria.

5. Oversight and Continuing Evaluation of Changing Conditions. Although the participation of Congressional leaders would be desirable early in the process, the initial operational decisions on

the support of an insurgent group normally will have been made by the executive branch. It then becomes incumbent on congressional leaders to be prepared to serve actively as a check and balance by employing the same standards that should have been applied in the initial decision to provide insurgent support. The effective legislative tools are already in place to control funding for assistance, deployments, and intelligence-gathering. The rapidly changing circumstances of the insurgency will require an on-going process of monitoring events followed by congressional action.

6. International Supervision and Continued Humanitarian Assistance. After a disengagement of forces, some form of international supervision of a peace accord and new elections, as well as supervision of humanitarian assistance needed for the postwar recovery, will be vital for the future prospects of democracy and nation building. Whatever justification was used initially by the states that intervened during the conflict probably could not be maintained as a basis for continuing unilateral intervention.

The circumstances of U.S. support for the Afghan resistance illustrates a policy that appears to have successfully accomplished, so far, each of these progressive steps in the policy analysis model. U.S. support of the Nicaraguan resistance, on the other hand, probably demonstrates the case of how a policy in favor of supporting a particular insurgent group has not fared well in the decisionmaking process.

The Administration appears to have made a fairly clear decision about the national security objectives it wanted to pursue through intervention in support of the Nicaraguan resistance. At the next stage, the policy of supporting the contras generally met most of the domestic criteria for intervention, including U.S. popular support for democratic self-determination in Nicaragua;

but the policy fell victim to vacillation in the consensus on support. Once the covert operations became public knowledge, there were warning signals that the uncertain public and congressional support was being affected by doubts as to other domestic criteria. These included, for example, questions about the popular Nicaraguan backing and democratic convictions of the contras, exacerbated by claims of their own human rights violations.

The real quagmire began at the next stage. The policy fell into the entanglement of alleged violations of domestic law in funding the operations. At yet another level, there was at least apparent disdain for international law by ignoring the ICJ as a potential forum for articulating the principled basis relied on by the United States for its intervention. These successive obstacles to a fully successful policy program were aggressively attempted or bypassed. The implementation of U.S. policy reached a point that some achievement resulted in terms of concessions by the Sandinista government. The farther down this policy road we went, however, the greater were the political and material costs for the United States, both at home and abroad.

V. CONCLUSION.

A substantial degree of commonality exists among U.S. national interests, the purposes of post-Charter international law, and the realities of global political relations. This recognition primarily relates to the benefits to be achieved and shared through a stable and just world system. Yet, significant conflicts exist as well, each of them generated by a different purpose.

One purpose that generates conflict at every level of insurgency analysis is that of self-determination and the enforcement of human rights. Traditional international law continues to be unable to reconcile, through an effective set of

rules on the use of force, the Charter's coequal principles of protecting state sovereignty, on the one hand, and promoting self-determination and fundamental human rights, on the other. Similarly, international relations seek an enduring equilibrium of political forces. An objective means to accommodate emerging nationalism and revolutionary change while avoiding superpower confrontations in regional conflicts must be provided. Finally, U.S. policy objectives strive to achieve a delicate balance between limited domestic resources and ever expanding global commitments resulting from the demands of national security, as well as a sense of obligation to spread democratic ideals.

The internal tension seems likely to continue at all levels of analysis--domestic, geopolitical, and legal--as the volatile issue of support to "freedom fighters" continues to impact on all three areas. The increasing world focus on human rights will continue to reflect the tension between the goal of traditional international law protecting state sovereignty versus the broader goals reflected in current international practice and the formulation of U.S. foreign policy. Our national interests call for us to bridge that gap by formulating and implementing a national policy on insurgency support that sets aside crisis management and simplistic geopolitical reactions. United States policy in support of insurgents must invoke the reasoned, humanitarian principles that are consistent with our own revolutionary origins, our respect for law, and our heritage of democratic freedoms.

1. McDougal, Lasswell, & Reisman, Theories about International Law: Prologue to a Configurative Jurisprudence, 8 Va. J. Int'l L. 1 (1968).

2. U.N. Charter art. 1. Article 1 provides four purposes of the United Nations Charter:

> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination or peoples, and to take other appropriate measures to strengthen universal peace.
> 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
> 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends.

3. Garcia-Amador, Violations of Human Rights and International Responsibility, First Report on International Responsibility, 1956, U.N. Doc. A/CN.4/96 (1956), reprinted in 2 Y.B. Int'l L. Comm'n 173, 193-203.

One view of human rights considers them as the "natural rights of mankind" based on fundamental regard for human nature and individual dignity. See, e.g., Donnelly, Human Rights as National Rights, 4 Human Rights Q. 391 (1982). Another perspective regards human rights to be based on a social justice concept of allocating society's benefits and burdens through its institutions. See, e.g., Beitz, Human Rights and Social Justice, in Human Rights and U.S. Foreign Policy 59 (P. Brown & D. MacLean ed. 1979).

4. See generally I. Brownlie, Principles of Public International Law 552-99 (1979); A. Cristescu, The Right of Self-Determination (1981); L. Henkin, The Rights of Man Today (1978); H. Lauterpacht, International Law and Human Rights (1973); A. Rigo Sureda, The Evolution of the Right of Self-Determination (1973); L. Sohn & T. Buergenthal, The International Protection of Human Rights (1973); D'Amato, International Human Rights at the Close of the Twentieth Century, 22 Int'l Law 167 (1988); Weston, Lukes, & Hnatt, Regional Human Rights Regimes: A Comparison and Appraisal, 20 Vand. J. Transnat'l L. 585 (1987).

5. See U.N. Charter, art. 1.

6. U.N. Charter, art. 55.

7. U.N. Charter, art. 56. The Charter also refers to the need to protect human rights in the Preamble and in Articles 13(1), 62(2), 68, and 76(c).

8. G.A. Res. 2625, 25 U.N. GAOR Supp. (No. 28) at 121, U.N. Doc. A/8028 (1970) [hereinafter The Declaration on Friendly Relations and Co-operation Among States].

   The first resolution that recognized the right of self-determination as a fundamental human right was the Declaration on the Granting of Independence to Colonial Countries and Territories, G.A. Res. 1514, 15 U.N. GAOR Supp. (No. 16) at 66, U.N. Doc. A.4683 (1961).

9. Resolution 2625, while reaffirming the fundamental principles of state sovereignty stated in the U.N Charter, imposes on every state "the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of their right to self-determination and freedom and independence."

10. The Delcaration on Friendly Relations and Co-operation Among States, supra note 8. These affirmative obligations of states to refrain from forcibly depriving peoples of the right to self-determination and to permit peoples to receive support in their struggle for freedom are particularly important because of what Professor Reisman refers to as

their "operational implications." Resolution 2625, he observes, was a significant codification of contemporary international law that has become widely accepted. See Reisman, The Resistance in Afghanistan is Engaged in a War of National Liberation, 81 Am. J. Int'l. L. 906, 908 (1987).

The affirmative obligations on states concerning self-determination may be said to extend to all states as part of customary law. Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), 1971 I.C.J. 16, 76 (Advisory Opinion) (Ammoun, separate opinion).

11. The Declaration on Friendly Relations and Co-operation Among States, supra note 8.

12. Western Sahara (Spain v. Mauritania v. Morocco), 1975 I.C.J. 12, 31 (Advisory Opinion) (citing the Namibia decision, held that self-determination as expressed in Resolution 2625 is an established principle under international law with respect to peoples in non-self-governing territories).

13. G.A. Res. 217, U.N. Doc. A/810, at 71 (1948). See Humphrey, The Universal Declaration of Human Rights: Its History, Impact, and Judicial Character, in Human Rights Thirty Years after the Universal Declaration 21 (B. Ramcharan ed. 1979).

Forty-eight member states of the General Assembly signed the Universal Declaration in 1948. The European Communist states adopted it in the Final Act of the Conference on Security and Cooperation in Europe (Helsinki 1975).

14. G.A. Res. 2200, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976).

15. G.A. Res. 2200, 21 GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976).

16. G.A. Res. 2200, 21 GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966) (entered into force Mar. 23, 1976).

17. See, e.g., Human Rights, A Compilation of International Instruments, U.N. Doc. ST/HR/1/Rev.1 (1978) (containing the text of thirteen instruments on specific human rights).

18. The European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953) [hereinafter European Convention]. There have been five protocols to the Convention. This legal institution is distinct from that of the European Communities system that has as its principal goal the integration of its members into what is referred to as the European Common Market. The latter system also represents an example of how specific individual, as well as national, economic rights and remedies are recognized on the international level.

    For an evaluation of the remedies afforded by the European Convention, see Waldock, The Effectiveness of the System Set Up by the European Convention on Human Rights, 1 Human Rights L.J. 1 (1980).

19. Each of the High Contracting Parties accepts the competence of three international bodies recognized by the Convention: the European Commission on Human Rights, the European Court of Human Rights, and the Committee of Ministers of the Council of Europe. These controlling institutions operate together to hear and resolve human rights complaints under the Convention.

    See generally, L. Mikaelsen, European Protection of Human Rights (1980); Z. Nejati, Human Rights Under the European Convention (1978); O'Boyle, Practice and Procedure Under the European Convention on Human Rights, 20 Santa Clara L. Rev. 697 (1980).

20. See European Convention, supra note 18, art. 25. See also Kruger, The European Commission of Human Rights, 1 Human Rights L.J. 67 (1980); Toth, The Individual and European Law, 24 Int'l and Comp. L.Q. 659, 660-662 (1975).

21. O.A.S. Treaty Series No. 36, at 1, O.A.S. Off. Rec. O.E.A./Ser. L/V/II.23 doc. rev. 2, Nov. 22, 1969 (entered into force July 18, 1978)
22. See Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, T.I.A.S. 2361, 119 U.N.T.S. 3, amended Feb. 27, 1970, 21 U.S.T. 607 [hereinafter the OAS Charter]. The Conference of the American States which adopted the Charter also adopted the American Declaration of the Rights and Duties of Man in 1948.
23. Final Act of the Conference on Security and Co-operation in Europe (Helsinki Accords), Aug. 1, 1975, Dept. of State Bull, Sept. 1, 1975; 14 I.L.M. 1292 (1975). See generally, Human Rights, International Law and the Helsinki Accord (Buergenthal ed. 1977).
24. Id. article VI.
25. See 2 B. Ferencz, Enforcing International Law -- A Way to World Peace, 489-91 (1983).
26. Id. at 490.
27. Sohn, International Law and Basic Human Rights, 62 U.S. Naval War C. Int'l L. Stud. 587, 595 (1980).
28. Agreement Between the Parties to the North Atlantic Treaty Regarding the Status of Their Forces, June 19, 1951, [1953] 7 U.S.T.1792, T.I.A.S. No. 2845 [hereinafter cited as NATO SOFA].
29. Supplementary Agreement to the NATO Status of Forces Agreement with Respect to Forces Stationed in the Federal Republic of Germany, Aug. 3, 1963, 1 U.S.T. 531, T.I.A.S. No. 5351.
30. H. Lauterpacht, supra note 4, at 27.
31. Jakovljevic, The Right to Humanitarian Assistance -- Legal Aspects, 260 Int'l Rev. Red Cross 469, 471-72 (1987). The term "humanitarian law" covers the two closely connected, yet distinct and independent, disciplines concerned with human rights law and the law of armed conflicts. These two disciplines developed separately in unrelated instruments with different procedures for implementation. The two stem

from the same origin, however, that being the common objective of mitigating cruelty against mankind. J. Pictet, Humanitarian Law and the Protection of War Victims 11-15 (1975).

32. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 31; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 351, T.I.A.S. No. 3365, 75 U.N.T.S. 287.

33. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), opened for signature Dec. 12, 1977, U.N. Doc. A/32/144/Annex I (1977), reprinted in 72 Am.J. Int'l L. at 457-502 (1978) [hereinafter Protocol I]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), opened for signature Dec. 12, 1977, U.N. Doc. A/32/144 Annex II (1977), reprinted in 72 Am. J. Int'l. L. at 502-11 (1973) [hereinafter Protocol II]. The United States signed the Protocols subject to understandings, but Protocol I has not been presented for ratification and Protocol II has been sent to the Senate for advice and consent, subject to four reservations and understandings. The Protocols were negotiated by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts. In its Final Act, the Diplomatic Conference listed twenty-three separate resolutions of the U.N. General Assembly reaffirming efforts

to increase humanitarian assistance and human rights in armed conflict.

See generally M. Bothe, K. Partsch, & W. Solf, New Rules for Victims of Armed Conflict: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949 (1982); Murphy, Sanctions and Enforcement of the Humanitarian Law of the Four Geneva Conventions of 1949 and Geneva Protocol I of 1977, 103 Mil. L. Rev. 3 (1984) (discusses specific measures of implementation in international conflict).

34. See, e.g., Trials of War Criminals Before the Nuernberg Military Tribunals under Control Council Law No. 10, 1946-1949 (1951); and In re Yamashita, 327 U.S. 1 (1946).

The case of United States v. Calley, 46 C.M.R. 1131 (A.C.M.R.), aff'd 22 C.M.A. 534 (1973), petition for writ of habeas corpus granted sub nom. Calley v. Calloway, 382 F. Supp. 650 (M.D. Ga. 1974), rev'd 519 F.2d 184 (5th Cir. 1975), cert. denied 425 U.S. 911 (1976), involved a prosecution for murder under the Uniform Code of Military Justice (UCMJ). General courts-martial have jurisdiction over violations of the law of war under Article 18, UCMJ. The UCMJ also recognizes in Article 21 the jurisdiction of military commissions over war crimes as defined under customary international law.

35. Blondel, Assistance to Protected Persons, 260 Int'l Rev. Red Cross, 451, 461-62.

36. The initiative is stated as a right to make an offer to the parties to the conflict. Relief organizations, such as the International Committee of the Red Cross (ICRC), also have limited rights to perform specific functions under the Geneva Conventions. Although adhering to principles of impartiality and striving for a low public profile in armed conflicts, the ICRC will publicly denounce violations when considered to be in the victims' best interest. The ICRC and other nongovernmental relief organizations ultimately rely on remedial action by the principal parties, and influence by

third parties. Meyer, Humanitarian Action: A Delicate Balancing Act, 260 Int'l Rev. Red Cross 485, 486-90 (1987).

37. Jakovljevic, supra note 31, at 471. Humanitarian law instruments have been more systematically promulgated and have been more readily accepted than human rights instruments as part of positive international law. The codification and progressive development of human rights law, however, is rapidly advancing to match that of humanitarian law. T. Meron, Human Rights in Internal Strife: Their International Protection 4 (1987).

38. Individual rights and standing based on status of forces agreements, as discussed previously, illustrate this trend. See supra note 30 and accompanying text. Accused individuals have asserted these guarantees personally, challenging the historical view that such treaties or executive agreements provide rights that only the sending state may raise on behalf of the individual. See, e.g., Holmes v. Laird, 459 F.2d 1211 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972) (accused soldier had no standing to challenge his return to Federal Republic of Germany under the NATO SOFA as it specifies its own corrective machinery, which is exclusive and non-judicial). But cf. United States v. Green, 14 M.J. 461 (C.M.A. 1983) (accused had standing to allege violation of the NATO SOFA where the drafters intended to create an individually enforceable right); United States v. Miller, 16 M.J. 169 (C.M.A. 1983) (the double jeopardy provision under the Korean SOFA was intended to define a personal, enforceable right under the treaty); United States v. Stokes. 12 M.J. 229 (C.M.A. 1982) (quoting the Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 215(b), to suggest that individual standing should be granted). See generally Gordon, Individual Status and Individual Rights Under the NATO Status of Forces Agreement and the Supplementary Agreement with Germany, 100 Mil. L. Rev. 49 (1983).

For the propositions that the status of forces agreements themselves represent important international precedent and parallel existing general international law on human rights, see respectively, R. Ellert, NATO "Fair Trial" Safeguards 62, 65 (1963); Dean, An International Human Rights Approach to Violations of NATO SOFA Minimum Fair Trial Standards, 106 Mil. L. Rev. 219, 232-241 (1984).

39. E.g., Treaty on Extradition, Oct. 21, 1976, United States-United Kingdom, art. V, 28 U.S.T. 227, T.I.A.S. No. 8468.

A Supplementary Extradition Treaty with Great Britain was concluded on June 25, 1985, as were similar treaties with other countries, in an effort to further narrow the rights that a defendant could raise against the governments' presupposed obligations to each other. In 1986, U.S. courts granted the petitions of four alleged members of the Irish Republican Army and refused to extradite them based on a finding that the crimes were in furtherance of a political revolt in Northern Ireland.

See generally Sofaer, The Political Offense Exception and Terrorism, 15 Den. J. Int'l L. & Pol'y 125 (1986).

40. Sohn, supra note 27, at 595.

41. See, e.g., Convention on Rights and Duties of States, art. 1, 49 Stat. 3097, T.S. No. 1, 165 L.N.T.S. 19 ("a) a permanent population; b) a defined territory; c) government; and d) capacity to enter into relations with the other states"). Article 2 of the Convention asserts that the state "shall constitute a sole person in the eyes of international law."

42. P. Jessup, A Modern Law of Nations 17 (1948).

43. Lissitzyn, Territorial Entities Other than States in the Law of Treaties, 125 Recueil des Cours 5, 9-15 (1968). See also I. Brownlie, supra note 4, at 60-71.

44. G.A. Res. 3237, 29 U.N. GAOR Supp. (no. 31) at 4, U.N. Doc. A/9631 (1974).

45. National liberation movements in Africa receiving recognition by the Organization for African Unity participate as observers in the General Assembly. See G.A. Res. 3280, 29 U.N. GAOR Supp. (No. 31) at 5, U.N. Doc. A/9631 (1974); G.A. Res. 31/30, 31 U.N. GAOR Supp. (No. 39) at 118, U.N. Doc. A/31/39 (1976).

46. Sofaer, Terrorism and the Law, 64 Foreign Affairs 901, 905 (1986). But see Beres, Terrorism, Insurgency and Geopolitics: The Errors of U.S. Foreign Policy, 17 Cal. W. Int'l L.J. 161-63 (1987) (the lawful cause does not legitimize all forms of violence).

47. See supra notes 32-33 and accompanying text.

48. Protocol I, supra note 33 art. 1, para. 4. Under this paragraph, Protocol I raises "wars of national liberation" to the level of international armed conflicts covered by Common Article 2 of the Geneva Conventions. International armed conflicts now include armed conflict between states, between a state and a belligerent, and also:

> armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

For the proposition that even greater measures beyond Protocols I and II are needed to protect individual rights in non-international armed conflicts, see T. Meron, supra note 37, at 132-33, 139-45.

49. See Sofaer, supra note 46, at 913. See also Feith, Protocol I: Moving Humanitarian Law Backwards, 19 Akron L. Rev. 531 (1986); Feith, Law in the Service of Terror--The Strange Case of the Additional Protocol I, The Nat'l Interest 36 (1986); Roberts, The New Rules for Waging War: The Case Against Ratification of Additional Protocol I, 26 Va. J. Int'l L. 109 (1985). But see Aldrich, Progressive

Development of the Law of War: A Reply to Criticisms of the 1977 Geneva Protocol I, 26 Va. J. Int'l L. 693 (1986); Solf, A Response to Douglas J. Feith's Law in the Service of Terror -- The Strange Case of the Additional Protocol, 20 Akron L. Rev. 261 (1986).

50. See Restatement (Second), Foreign Relations Law of the United States § 94 reporter's note (1965). These prerequisites for belligerent status included: (1) a well-organized opposition group, (2) conventional military operations conducted in compliance with the law of war, and (3) de jure or de facto control over an identifiable portion of the territory or population.

On the status of belligerents and the neutrality of third states, see generally 1 C. Hyde, International Law 198-200 (2nd rev. ed. 1945) (noting a decline in formal recognition of belligerent status); H. Lauterpacht, Recognition in International Law 187 (1947); 2 L. Oppenheim, International Law (7th ed. H. Lauterpacht 1952).

51. See I. Brownlie, International Law and the Use of Force by States 327 (1963). Insurgents typically failed to achieve belligerent status because they failed to exercise de facto control over an identifiable part of the territory or population.

52. L. Henkin, R. Pugh, O. Schachter, & H. Smit, International Law: Cases and Materials 190-91 (1980) (cites as an example the Geneva Agreement of 1954 concerning Cambodia and Laos, which was signed by insurgent representatives).

53. N.Y. Times, May 6, 1988, at A1, col. 3.

54. U.N. Charter, art. 2, para. 4.

55. The history of establishing formal prohibitions on recourse to war against other states represents a rejection of the classic formulation of Clauswitz that war is an extension of national foreign policy. This reformation dates back at least to the early 1900's, most notably to the Kellogg-Briand Pact. See General Treaty for the Renunciation of War as an Instrument of National Policy of August 27, 1928, 46 Stat. 2345, 94

L.N.T.S. 63 (entered into force July 24, 1929). See also J. Brierly, The Law of Nations 408-10 (6th ed. 1963).

For sources on, and an overview of the historical antecedents to Article 2(4) of the Charter, see Gordon, Article 2(4) in Historical Context, 10 Yale J. Int'l L. 271, 273-75 (1985). See generally, A. Thomas & A. Thomas, The Concept of Aggression in International Law (1972).

56. On the development of a definition of aggression, see I. Brownlie, supra note 51, at 351-55; and J. Brierly, supra note 55, at 379, 382.
57. J. Stone, Legal Controls of International Conflict 330 (1959).
58. Id. at 330-34.
59. See I. Brownlie, supra note 51, at 355-56.
60. M. McDougal & F. Feliciano, Law and Minimum World Public Order 152-53 (1961).
61. I. Brownlie, supra note 51, at 357.
62. Id. at 356.
63. The Declaration on Friendly Relations and Co-operation Among States, supra note 8.
64. Id.
65. G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974) [hereinafter The "Definition of Aggression" Resolution].
66. Id. art. 2.
67. Id. art. 5.
68. Id. art. 1.
69. Id. art. 3.
70. Id. art. 6.
71. Id. art. 3.
72. Id. art. 7, which states:

> Nothing in this Definition, and in particular article 3, could in any way prejudice the right to self-determination, freedom, and independence, as derived from the Charter, of peoples forcibly deprived of that right and referred to in the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, particularly peoples under colonial

> and racist regimes or other forms of alien domination; nor the right of these peoples to struggle to that end and to seek and receive support in accordance with the principles of the Charter and in conformity with the above-mentioned Declaration.

One can also see the same emphasis on colonial, alien, and racist regimes (sometimes referred to by the acronym "CAR" regimes) that is contained in the Geneva Conventions' Additional Protocols, discussed previously. See supra note 46 and accompanying text.

73. See, e.g., Declaration of the Admissibility of Intervention into the Domestic Affairs of States, G.A. Res. 2131, 20 U.N. GAOR Supp. (No. 14) at 11, U.N. Doc. A/6014 (1965). Resolution 2131 states in part:

> 1. No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, and cultural elements, are condemned;
> 2. No State may use or encourage the use of economic, political, or any other type of measures to coerce another State in order to obtain from it advantages of any kind. Also, no State shall organize, assist, foment, finance, incite, or tolerate subversive, terrorist, or armed activities directed towards the violent overthrow of the regime of another State, or interfere in civil strife in another State;
> 3. The use of force to deprive peoples of their national identity constitutes a violation of their inalienable rights and of the principle of non-intervention; . . .
> 6. All States shall respect the right of self-determination and independence of peoples and nations, to be freely exercised without any foreign pressure, and with absolute respect for human rights and fundamental freedoms. Consequently, all States shall contribute to the complete elimination of racial discrimination and colonialism in all its forms and manifestations;. . . .

The Soviet Union proposed this declaration of principles on nonintervention. The General Assembly adopted the final draft on December 21, 1965, by a vote of 109 in favor, none

against, with the United Kingdom abstaining. 20 U.N. GAOR, U.N. Doc. A/PV 1407 (1965).

74. A. Thomas & A. Thomas, Non-Intervention 68 (1956).

75. Id. at 71.

76. OAS Charter, supra note 22. Article 15 states:

> No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. The foregoing principle prohibits not only armed force but also any other form of interference or attempted threat against the personality of the State or against its political, economic and cultural elements.

Article 19 narrows the broad statement by providing that measures adopted for the maintenance of peace and security consistent with existing treaties would not violate the prohibition on intervention.

77. Id. arts. 16-18.

The Seventh Meeting of Consultation of Ministers of Foreign Affairs, convened under the OAS Charter, reaffirmed the prohibition on intervention in the Declaration of San Jose, Costa Rica, August 28, 1960. Article 3 of the Declaration addressed the principle in the context of national and individual fundamental freedoms:

> [T]hat each state has the right to develop its cultural, political, and economic life freely and naturally, respecting the rights of the individual and the principles of universal morality, and as a consequence, no American state may intervene for the purpose of imposing upon another American state its ideologies or its political, economic, or social principles.

78. Inter-American Treaty of Reciprocal Assistance Between the United States of America and Other American Republics (Rio Treaty), Sept. 2, 1947, 62 Stat. 1681, T.I.A.S. No. 1838, 21 U.N.T.S. 77 (entered into force Dec. 3, 1948) [hereinafter the Rio Treaty].

The drafters of the Rio Treaty intended to provide for shared responsibility among the American states for hemispheric peace and security consistent with the Monroe

Doctrine, and thereby close an era of United States protective intervention. R. Vincent, Nonintervention and International Order, 195-97, 207 (1974).

79. R. Vincent, supra note 78, at 196 (quoting Article 5 of the OAS Charter).

80. A. Thomas & A. Thomas, supra note 74, at 67; R. Vincent, supra note 78, at 11-12 (also provides an extensive bibliography of sources on the development and current applications of the concept of nonintervention).

81. R. Vincent, supra note 78, at vii. Professor Vincent concludes, however, that the essential means do exist within international law to control internal conflicts in an effective and realistic approach to establishing international order.

82. See A. Organski, World Politics 234-43 (1968). Organski observed that emerging nationalistic groups under alien authority, whether colonies in the classical sense or other forms of dependency, made increasing demands as part of a normal and predictable process of movement to independence. First comes unification for basic human rights, then the demands for political independence, and finally, the efforts to achieve economic independence.

83. R. Vincent, supra note 78, at vii. Vincent asserts that the historical forces undercutting the nation-state system also tend to undermine the rule of nonintervention. Id. at 349-50. Among them he cites the proliferation of small states and technological advances that make "the small less unequal." Nonetheless, he observes that in state practice a relative caution shown by states before they become involved in civil wars, especially by superpowers outside their spheres of influence, that suggests nonintervention does have force and utility as a principle. Id. at 359-60.

84. The threat or use of force is a particular form of intervention, a form which has been characterized as "dictatorial interference" in the internal and external affairs of another state. See J. Brierly, supra note 55, at 402; A. Thomas & A. Thomas, supra note 74, at 68.

85. A. Organski, supra note 82, at 117. He notes, however, that "[n]ations will hardly forgo the use of force in areas where disagreement is so fundamental that persuasion, reward, and punishment are without result." Id.

86. J. Brierly, supra note 55, at 415 (citing the Preamble to the U.N. Charter, which states "that armed force shall not be used").

87. For examples of analytical models of conflict by several scholars, see generally Vietnam War and International Law (R. Falk ed. 3 vols. 1972); and J.N. Moore, Law and the Indo-China War (1976). One example, developed by Professor Falk, matches four categories of armed conflict with appropriate levels of force. Professor Moore balances nonintervention principles against the basic community values of self-determination, the preservation of minimum human rights, and the maintenance of minimum public order. A general analysis of these nonintervention standards in internal war may be found in R. Vincent, supra note 78, at 317-25.

88. See I. Brownlie, supra note 51, at 377 (referring to the difficulties of determining the animus aggressionis). See also supra p. 13.

89. See I. Brownlie, supra note 51, at 337-78.

90. See A. Organski, supra note 82, at 110-11.

91. International recognition of the conflict reflects the historical problem of insurgent groups' lack of status under international law. See supra notes 50-52 and accompanying test.

92. R. Vincent, supra note 78, at 285-86.

93. I. Brownlie, supra note 51, at 370.

The "Definition of Aggression" Resolution, supra note 65, art. 3, includes among its enumerated acts of aggression "(g) The sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as

to amount to the acts listed above, or its substantial involvement therein."

94. See supra note 50 and accompanying text.

95. See supra notes 48-49 and accompanying text.

96. Coping with Internal Conflicts: Dilemmas of International Law, 13 Ga. J. Int'l & Comp. L. 179-80 (Supp. 1983). This volume presents a series of articles and panel discussions by prominent participants at a workshop that considered the need to develop legal principles to control internal conflicts threatening international stability. Its dialogue illustrates the difficulties and controversy associated with characterizing third state involvement in low intensity conflicts.

97. The basic categories of the use of force vary in number depending on how they are identified. Professor Reisman enumerates nine potential categories for intervention involving military force; self-defense; intervention within a sphere of influence or critical zone of defense; humanitarian intervention; self-determination and decolonization; intervention to replace an elite in another state; treaty-sanctioned intervention; intervention to gather evidence for international proceedings; enforcement of international judgments; and countermeasures, such as reprisal or retortion. Reisman emphasizes, however, that the categories in themselves are not determinative of lawfulness. See Reisman, Criteria for the Lawful Use of Force in International Law, 10 Yale J. Int'l L. 279, 281-82 (1985).

98. See U.N. Charter art. 51, which states:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security

> Council under the present Charter to take at any time such action as it deems necessary to maintain or restore international peace and security.

99. See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, para. 201 (Judgment on the Merits of 27 June) reprinted in 25 Int'l Legal Mat. 1023 (1986) [hereinafter Nicaragua v. United States]. The operative part of the judgment and the summaries of the judgment and separate opinions, official documents provided by the court, are reprinted in 25 Int'l Legal Mat. 1089 and in 80 Am. J. Int'l L. 785 (1986).
100. Id. para. 201.
101. Id. para. 205.
102. Id. paras. 227-38.
103. D. Bowett, Self-Defense in International Law 185-86 (1958).
104. See J. Brierly, supra note 55, at 405-08 (stating that "nearly every aggressive act is sought to be portrayed as an act of self-defence"); I. Brownlie, supra note 51, at 270-75.
105. M. McDougal & F. Feliciano, supra note 60, paras. 232-44.
106. See Nicaragua v. United States, supra note 99, paras. 183-200.
107. The "Definition of Aggression" Resolution, supra note 65, art. 1, explanatory note (a).
108. M. McDougal & F. Feliciano, supra note 60, at 220-22 (citing as examples the U.N. Security Council decisions in the 1948 case of Palestine and the 1950 case concerning the two Koreas).
109. See Moore, The Secret War in Central American and the Future of World Order, 80 Am. J. Int'l L. 43 (1986).
110. Although the United States had withdrawn its consent to the jurisdiction of the court, the International Court of Justice in the case brought by Nicaragua did consider the record of factual allegations publicly made by the Administration against the Sandanista regime, but the court declined to apply the lesser threshold for the right of self-defense.

111. Moore, supra note 109, at 43-44. See also Moore, Grenada and the International Double Standard, 78 Am J. Int'l L. 145 (1984); Rostow, Nicaragua and the Law of Self-Defense Revisited, 11 Yale Journal of International Law 437 (1986) (contains at 450 n.51 a very useful review of the major sources on what constitutes an "armed attack"). Rostow criticizes the "double standard" under traditional international law that protects radical regimes. He concludes that in order to lower the threshold for general war, states that are attacked should be allowed, under the right of self-defense, to adopt as a minimum the methods of the aggressor states.

112. Professor Moore's article, supra at note 109, was followed by an exchange of published arguments. See Rowles, "Secret Wars," Self-Defense and the Charter--A Reply to Professor Moore, 80 Am. J. Int'l 509 (1986); Moore, The Secret War in Central American--A Response to James P. Rowles, 27 Va. J. Int'l L. 273 (1987).

113. M. McDougal & F. Feliciano, supra note 60 at 257. On unilateral measures of intervention in general, see Restraints on the Unilateral Use of Force: A Colloquy, 10 Yale J. Int'l L. 261 (1985). The series of articles presented in the colloquy focuses on "whether the Charter regime continues to provide meaningful guidelines for contemporary policymakers." Id.

114. See M. McDougal & F. Feliciano, supra note 60, at 247-53.

115. Id. at 253.

116. D. Bowett, supra note 103, at 87-105 (observing that protection of nationals was a part of customary international law that still survives under the U.N. Charter prohibitions on the unlawful use of force); Waldock, The Regulation of the Use of Force by Individual States in International Law 81 Recueil des Cours 451, 166-67 (1952).

117. See, e.g., I. Brownlie, supra note 51, at 292-301 (conceding that the issue presents "particular difficulties"); L. Henkin, How Nations Behave 145 (1963). But see Lillich,

Humanitarian Intervention: A Reply to Dr. Brownlie and a Plea for Constructive Alternatives, Law and Civil War in the Modern World 229 (1974).

118. I. Brownlie, supra note 51, at 292-93. On the United States' recent assertion of the right of intervention to protect nationals, see Riggs, The Grenada Intervention: A Legal Analysis, 109 Mil. L. Rev. 1, 16-36 (1985).
119. J. Brierly, supra note 55, at 427-28.
120. On the conditions for lawful intervention to protect nationals, see Waldock, supra note 116, at 467.
121. I. Brownlie, supra note 51, at 321-27.
122. Id.
123. Id. at 321-22.
124. Even though traditional principles might view continued support to the government as unlawful intervention, an argument exists that, as disorder intensifies and escalates into organized insurgent activity, it would also be unlawful to stop the flow of security assistance to the established government. To stop the support might tip the balance against the government as a form of unlawful intervention. Moore, Legal Standard for Intervention in Internal Conflicts, 13 Ga. J. Int'l & Comp. L. 191, 196 (Supp. 1983).
125. See A. Thomas & A. Thomas, supra note 74, at 93-94; Perkins, The Right of Counterintervention, 17 Ga. J. Int'l & Comp. L. 171, 183-95 (1986) (provides at 185 n.43 a review of contemporary sources criticizing the traditional rule).
126. The members of the General Assembly adopted Resolution 2625, "(c)onvinced that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality. . . ." The Declaration on Friendly Relations and Co-operation Among States, supra note 8 (emphasis in original).

127. Resolution 2625, on the issue of peoples opposing foreign intervention, states that "(i)n their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter." Id.

128. See Perkins, supra note 125, at 180-83. Perkins observes that counterintervention enhances a balance of power by helping to preserve the status quo against any foreign coercion or interference with the right of self-determination. Id. at 183.

129. See, e.g., id. at 224. See also Schachter, The Right of States to Use Armed Force, 82 Mich. L. Rev. 1620, 1642 (1984); Sohn, Gradations of Intervention in Internal Conflicts, 13 Ga. J. Int'l & Comp. L. 225, 229-30 (Supp. 1983).

130. See, e.g., Perkins, supra note 125, at 176-80. See also, E. Zoller, Peacetime Unilateral Remedies: An Analysis of Countermeasures 136 (1984).

131. Professor Reisman has argued that the successive General Assembly Resolutions condemning the Soviet invasion of Afghanistan and its imposition of a nonrepresentative government have failed to take "full advantage of the legal vocabulary that the Assembly itself has developed for such events." He concludes that the result has deprived the Afghan resistance, as well as its third state supporters, of substantial international authority in a struggle for self-determination against the Soviet-backed Kabul government. See Reisman, supra note 10, at 907-08.

132. This view of counterintervention as a lawful sanction is distinct from a second view that considers the action to be a right of reprisal. See generally, Akehurst, Reprisals by Third States, 1970 Brit. Y.B. Int'l L. 1; Tucker, Reprisals and Self-Defense: The Customary Law, 66 Am. J. Int'l L. 586 (1972).

133. See Perkins, supra note 125, at 201. But see I. Brownlie, supra note 51, at 265-68.

Professor Yoram Dinstein represents the conservative view that the U.N. Charter does not incorporate intervention in support of self-determination or human rights. "The long and short of it is that, in the name of justice, the existing legal proscription on the use of inter-State force is corroded by political motivations." Y. Dinstein, War, Aggression and Self-Defence 69 (1988). He concludes that the interpretation of humanitarian intervention as being compatible with the purpose underlying Article 2(4) can be dismissed as misconstruing the Charter. "Nothing in the Charter substantiates the right of one State to use force against another under the guise of ensuring the implementation of human rights." Id. at 89. Apart from the Article 51 exception for self-defense, any action must be left to collective measures by the U.N. Security Council. Id.

134. Perkins, supra note 125, at 221.

135. Id. at 222-23.

136. See, e.g., 1 L. Oppenheim, International Law 312 (H. Lauterpacht 8th ed. 1955); I. Brownlie, supra note 51, at 338-44; Clark, Humanitarian Intervention: Help to Your Friends and State Practice, 13 Ga. J. Int'l & Comp. L. 211 (1983).

But see Levitin, The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention, 27 Harv. Int'l L.J. 621 (1986).

Part of the controversy arises from the broad range of actions that may potentially be encompassed by the category of "humanitarian intervention." Many commentators both in the scholarly and popular media use the term in mixed meanings that variously may include or overlap with the concept of protection of nationals or counterintervention. Humanitarian intervention for present purposes treats these as separate justifications.

137. Reisman & McDougal, Humanitarian Intervention to Protect the Ibos, in Humanitarian Intervention and the United Nations 167, 168-78 (R. Lillich ed. 1973). "The advent of the United Nations neither terminated nor weakened the customary institution of humanitarian intervention." Id. at 171.

138. See I. Brownlie, supra note 51, at 340.

139. See Clark, supra note 136, at 212 (citing Franck & Rodley, After Bangledesh: The Law of Humanitarian Intervention by Military Force, 67 Am J. Int'l L. 275 (1973)). Clark notes, however, that the United States made a "somewhat half-hearted" claim of humanitarian intervention in the Dominican Republic in 1965. Id.

One commentator who conducted an analysis of the legal bases offered by the United States after the Grenada operation has suggested that the justifications offered for the intervention, specifically, the request of the Governor-General and the Organization of the Eastern Caribbean States, and the asserted need to protect nationals, actually were the less sustainable justifications on the facts. Instead, the realities supported a substantially better case for humanitarian intervention. See Levitin, supra note 136, at 650-51.

140. Fonteyne, Forcible Self-Help by States to Protect Human Rights: Recent Views from the United Nations, in Humanitarian Intervention and the United Nations, supra note 137, at 197, 219.

141. Id. at 220.

142. Reisman & McDougal, supra note 137, at 184.

143. Levitin, supra note 136, at 652-53 (citing M. Walzer, Just and Unjust Wars 107-08 (1977)).

Genocide is the extreme of where humanitarian intervention would be appropriate. This recurrent horror was demonstrated as recently as Pol Pot in Cambodia and Idi Amin in Uganda.

144. Sohn, supra note 129, at 179.

145. Reisman, supra note 97, at 281. He notes that the consequence of a less effective collective security system has been a partial revival of the jus ad bellum standards needed to differentiate between lawful and unlawful conflicts between states. Id.

146. Schachter, The Lawful Resort to Unilateral Use of Force, 10 Yale J. Int'l L. 261, 293 (1985).

147. D'Amato, Nicaragua and International Law: The "Academic" and the "Real", 79 Am J. Int'l L. 657 (1985).

148. Rostow, The Legality of the International Use of Force by and from States, 10 Yale J. Int'l L. 286-87, 290 (1985).

149. Paust, Conflicting Norms of Intervention: More Variables for the Equation, 13 Ga. J. Int'l & Comp. L. 305, 307-08 (Supp. 1983).

150. See, e.g., Schachter, supra note 146, at 291-93. Professor Schachter would permit intervention in defense of the political independence of a state, but rejects "the contention that force may be used unilaterally to achieve such laudable ends as freedom, self-rule and human rights." Id. at 293.

151. Sohn, supra note 129, at 179. Professor Sohn offers the following as a "very modest" rule: "No military intervention by one state is permissible except in an extreme emergency requiring instant response and subject to immediate termination of such emergency action on the request of the United Nations or an appropriate regional organization." Id. at 230.

A significant degree of uncertainty would remain under the rule. Responsibility would devolve first to the individual state to determine whether such an emergency exists. The organization then would have to apply an objective standard as to whether the use of force was appropriate under the particular circumstances.

152. Hazard, The Role of the Eastern Bloc and the Third World, 9 GMU L. Rev. 6, 10 (1986).

153. Levitin, supra note 136, at 653. This is what he calls the "Liberation of Paris Principle: if the people throw flowers,

the invasion is lawful; if they throw anything else it is not." Id. at 654. On the justifications for U.S. humanitarian intervention in Grenada, see supra note 139.

154. Id. at 651.

155. See Pezzullo, Intervention in Internal Conflict: The Case of Nicaragua, 13 Ga. J. Int'l & Comp. L. 201 (Supp. 1983).

156. Id. at 202-03.

157. See, e.g., Beres, Ignoring International Law: U.S. Policy on Insurgency and Intervention in Central America, 14 Den. J. Int'l L. & Pol'y 76 (1985); Falk, The Decline of Normative Restraint in International Relations, 10 Yale J. Int'l L. 263 (stating that a more "law oriented foreign policy" would contribute to security); Friedlander, Confusing Victims and Victimizers: Nicaragua and the Reinterpretation of International law, 14 Den. J. Int'l L. & Pol'y 87 (1985).

158. M. McDougal & F. Feliciano, supra note 60, at 45-49. Professors McDougal and Feliciano provide a reminder that who the actual decisionmaker becomes will depend on how and when the particular problem arises. "Conspicuous among decision-makers is, of course, the military commander who must on occasion, at least in the first instance, pass upon the lawfulness both of his own proposed measures and of measures being taken against him." Id. at 48 (footnote omitted).

159. Kreisberg, Does the U.S. Government Think That International Law is Important?, 11 Yale J. Int'l L. 479, 485 (1986). Paul H. Kreisberg served as Deputy Director, Policy Planning Staff, U.S. Department of State, from 1977 through 1981.

160. Id. at 479-80.

161. M. Kalb & B. Kalb, Kissinger 26 (1974).

162. The paragraph that follows draws on H. Kissinger, Nuclear Weapons and Foreign Policy, 120-27, 246-50 (1969) (originally published in 1957).

163. "Limited war" in its broad meaning can be defined as military conflict in which the participants respect reciprocal limits on

those actions directed toward clearly established objectives that are susceptible of negotiated settlement in order to minimize the aggregate destruction of mutually shared values. M. McDougal & F. Feliciano, supra note 60, at 55.

See also H. Kissinger, American Foreign Policy, 117-18 (1969) (stating that the decline of U.S. predominance in physical resources and political power requires a prioritization of limited means to achieve carefully defined ends).

The assertion that the use of force must be consistent with political needs does not necessarily equate to the Clauswitz formula that force is the tool of political needs. Political consideration must be given to international norms as well as national interests.

164. H. Kissinger, A World Restored 317-18 (Sentry ed.) (originally presented as a doctoral dissertation in 1954).
165. Id. at 318.
166. Id. at 328.
167. Id. at 326.
168. Perkins, supra note 125, at 181. See also supra note 128 and accompanying text.

See generally J. Perkins, The Prudent Peace: Law as Foreign Policy (1981); Vagts & Vagts, The Balance of Power in International Law: A History of an Idea, 73 Am. J. Int'l L. (1979).

169. See H. Kissinger, supra note 164, at 328.
170. Report of the National Bipartisan Commission on Central American 103-04 (January 1984) (hereinafter the Kissinger Commission Report).
171. Id. at 84.
172. See, e.g., A. Organski, supra note 82, at 272-99, 338.
173. See supra note 82 and accompanying text.
174. See A. Organski, supra note 82, at 273, 295.
175. Hazard, supra note 152, at 6.
176. Id. at 8-9. See also supra note 73 and accompanying text.
177. See supra note 23 and accompanying text.

178. Hazard, supra note 152, at 10.

179. The Soviet Union has supported so frequently the idea of national liberation wars that it can hardly now reject self-determination as a lawful basis for action by the international community. See Reisman, supra note 10, at p. 908-09. Professor Reisman notes that the reservations expressed by some states about introducing national liberation principles into international law derive from Soviet practices that make the concept appear supportive only of totalitarian expansion. "National liberation" need not be one-sided if applied by the international community, and particularly by the General Assembly, in a "responsible and even-handed fashion, consistent with the basic principles of the United Nations Charter." Id. at 909.

180. Valkenier, New Soviet Thinking About the Third World, 4 World Pol'y J. 651 (1987).

181. Id. at 654, 662. See also Brown, Change in the Soviet Union, 64 Foreign Aff. 1048, 1060-63 (1986).

But see Simes, Gorbechev: A New Foreign Policy?, 65 Foreign Aff. 477, 487 (1987). Simes states that the Brezhnev Doctrine is still "very much part of Gorbachev's policy." Id. at 487.

182. See Fukuyama, Gorbachev and the Third World, 64 Foreign Aff. 715 (1986).

183. Id. (quoting from the report of General Secretary Mikhail Gorbachev at the 27th Party Congress of the Soviet Union, October 1985).

184. Id. at 720.

185. Valkenier, supra note 180, at 672.

186. McGwire, Update: Soviet Military Objectives, 9 World Pol'y J. 723, 730 (1987).

187. Id. at 731.

For the argument that the current Soviet statements and actions are tactical, see generally Simes, supra note 181. Simes concludes that:

> All in all, Soviet geopolitical maneuvering under Gorbachev has demonstrated a new sense of purpose, a new realism and a new creativity. What it has not demonstrated is any kind of turn inward, any evidence that Gorbachev and his colleagues are scaling down Soviet global ambitions in order to concentrate on domestic economic modernization. Nor has the Soviet Union shown any hesitation to use force to accomplish its objectives or, for that matter, any reluctance to support governments charged with terrorism.

Id. at 491.

188. See id. See also Beres supra note 157, at 85 (stating that "(t)he central problem lies in [the United States'] identification of East/West competition as the only meaningful axis of global conflict").

189. Rosenfeld, The Guns of July, 64 Foreign Aff. 698-99 (1986) (citing at 698 n.1 a list of sources analyzing and evaluating the Reagan Doctrine).

See also Layne, The Real Conservative Agenda, 61 Foreign Pol'y 73 (1985-86). The past presidential containment doctrines, says Layne, recognized the strategic and economic limitations that required the United States to more realistically assess its interests and redefine its commitments abroad, in a way that the Reagan Doctrine, literally construed, fails to adequately address. Id. at 73-83.

190. E.g., Schwenniger, The 1980's: New Doctrines of Intervention or New Norms of Nonintervention?, 33 Rutgers L. Rev. 423, 426 (1981). Schwenniger noted that the Brezhnev Doctrine, as reflected in the Soviet invasion of Afghanistan, and the Carter-Brown Doctrine on the protection of resources in the Trilateral World, as reflected in the creation of the Rapid Deployment Force, together demonstrated the lack of superpower respect for the equal sovereignty of smaller Third World nations. Id. at 423.

191. Id. at 700. See also Joyner & Grimaldi, The United States and Nicaragua: Reflections on the Lawfulness of

Contemporary Intervention, 25 Va. J. Int'l L. 621, 634 (1985).

192. See Layne, supra note 189, at 704.

193. See Rosenfeld, supra note 189, at 704.

194. Beres, supra note 157, at 77.

195. In the Address, the President made a call for Americans to become for emerging democracies "what Lafayette, Pulaski, and von Stueben were for our forefathers and the cause of American independence." He also expanded on the theme of assistance to burgeoning world democracy:

> But not just Nicaragua or Afghanistan; yes, everywhere we see a swelling freedom tide around the world--freedom fighters rising up in Cambodia and Angola, fighting and dying for the same democratic liberties we hold sacred. Their cause is our cause: freedom. . . .
> . . . .
> . . . As the global democratic revolution has put totalitarianism on the defensive, we have left behind the days of retreat--America is again a vigorous leader of the free world, a nation that acts decisively and firmly in the furtherance of her principles and vital interests.

Wash. Post, Jan. 26, 1988, at A10, col. 1.

196. See Rosenfeld, supra note 189, at 702. See also Beres, supra note 157, at 77-78; Vance, The Human Rights Imperative, 63 Foreign Policy 3, 11 (1986).

197. See Jacoby, The Reagan Turnaround on Human Rights, 64 Foreign Aff. 1066-67 (1986) (quoting from the presidential address to Congress in March 1986). Jacoby also notes that the reassuring words on human rights had been immediately preceded by the Administration's assistance in the ouster of two right-wing dictators, Presidents Marcos from the Philippines and Duvalier from Haiti. More recently, the Administration has applied pressure on Panamanian dictator Manuel Noriega to relinquish powers. See Wash. Post, Mar. 19, 1988, at A1, col. 5.

198. Vance, supra note 196, at 10-11.

199. Id.

200. Id. at 11.

201. Solarz, When to Intervene, 63 Foreign Policy 20, 37 (1986).

202. Vance, supra note 196, at 12-17.

203. See R. Vincent, supra note 78, at vii. See also Beres, supra note 157, at 76-77.

204. See J. Perkins, supra note 125, at 226. Perkins, in the context of counterintervention, states that:

> A misunderstanding with potentially tragic consequences seems to persist in the minds of many. This is the conception that realists have to make a choice between the rule of law and the hard policy decisions necessary to deal with the realities of power and contention. This, I submit, is a misconception. The law evolves out of these realities.

Id.

205. Levitin, supra note 136, at 651.

206. See Beres, supra note 157, at 77-78.

207. Reisman, supra note 97, at 280.

208. See generally Matheson, Practical Considerations for the Development of Legal Standards for Intervention, 13 Ga. L. Int'l & Comp. L. 205 (Supp. 1983).

209. Id. at 206.

210. Id. at 208.

211. Vance, supra note 196, at 7. Cyrus Vance, as a former member of the Carter Administration, referred to criticism of that Administration's emphasis on human rights in U.S. foreign policy. No foreign policy, Vance wrote, can obtain the support of the American people unless it reflects their own respect for human dignity and freedom, but practical judgements on policy are required too. See id.

212. Michael J. Matheson has authored a more complete analysis of this subject of domestic security interests and legislation. The book is presently pending publication.

213. See War Powers Resolution, 50 U.S.C. §§ 1541-1548 (1982 & Supp. IV 1986).

214. Id. § 1542.

215. Id. § 1544(b).

216. Id. § 1547(a).

217. Id. § 1547(c) (emphasis added).

218. See Javits, War Powers Reconsidered, 64 Foreign Aff. 130, 133-34 (1985).

See also Cranston, Revise the War Powers Act, Wash. Post, Oct. 22, 1987, at A23, col. 1. Senator Cranston argued that the War Powers Resolution permits the President to commit troops before the reporting requirement is triggered, if indeed it is triggered at all. He urged that all "nonemergency" deployments should be joint legislative-executive decisions. "As we have seen," wrote Senator Cranston, "Congress has proven reluctant to press for the withdrawal of troops once deployed--however ill-advised the deployments might be."

219. See generally R. Turner, The War Powers Resolution: Its Implementation in Theory and in Practice (1983). Turner makes the argument that the resolution is unconstitutional, ineffective, and fails to serve U.S. national security interests.

But see Henkin, Foreign Affairs and the Constitution, 66 Foreign Aff. 284 (1987). Professor Henkin has noted that the War Powers Resolution is but one illustration of Congress regaining a measure of power that it had unnecessarily ceded to presidential discretion early in U.S. history. He stated that "Congress has been more successful when it has argued, not constitutional limits on the president's initiatives, but rather the breadth of its own powers, and their supremacy." Id. at 294-95.

220. See generally Cole, Challenging Covert War: The Politics of the Political Question Doctrine, 26 Harv. Int'l L.J. 155 (1985).

221. 22 U.S.C. §§ 2151-2429 (1982 & Supp. IV 1986). The Foreign Assistance Act (FAA) includes four major grant programs: the Military Assistance Program, International Military Education and Training, Antiterrorism Assistance, and the Economic Support Fund. The FAA also authorizes

assistance to friendly nations and international organizations for peacekeeping operations.

222. 22 U.S.C. §§ 2751-2796 (1982 & Supp. IV 1986). The Arms Export Control Act (AECA) provides for the Foreign Military Sales Program. This program governs all sales of "defense articles" and "defense services." Defense services is defined as to also control the sale of all forms of training.

223. 22 U.S.C. § 2761(c).

224. Matheson, supra note 208, at 206.

225. See supra note 51 and accompanying text.

See also Sohn, supra note 129, at 227-28. Professor Sohn summarized what he called "fuzzy" rules on the gradations of assistance on behalf of a constituted government, which are set forth here in order of increasing permissibility:

1. "Limited military action" in a foreign country during a large-scale internal conflict.
2. Transporting personnel, equipment, and supplies.
3. Intelligence observation and reporting.
4. Military planners and advisers, not engaged in fighting and equipped only with side-arms for personal self-defense. (By inference, these would include in-country military trainers).
5. Military training provided in one's own country to the forces of the supported government.
6. "Preventive" security assistance prior to a crisis conflict.
7. Arms grants and sales, which he recognizes to be a very common practice among medium and major powers.

He also notes that these are provided clandestinely by different countries to varying degrees, but he makes no mention that this distinction should affect the lawfulness of the support. See id. at 229.

226. United States Policy Options with Respect to Nicaragua and Aid to the Contras: Hearings Before the Senate Comm. on Foreign Relations, 100th Cong., 1st Sess. 183 (1987)

(prepared statement of Elliot Abrams, Assistant Secretary of States for Inter-American Affairs).

227. Congress also enacted parallel legislation to establish human rights criteria for programs of economic aid under section 116 of the FAA. See 22 U.S.C. § 2151n (1982 & Supp. IV 1986).

228. 22 U.S.C. § 2420.

229. 22 U.S.C. § 2304. This section provides, in relevant part:

> (a)(1) The United States shall, in accordance with its international obligations as set forth in the Charter of the United Nations and in keeping with the constitutional heritage and traditions of the United States, promote and encourage increased respect for human rights and fundamental freedoms throughout the world without distinction as to race, sex, language, or religion. Accordingly, a principle goal of the foreign policy of the United States shall be to promote the increased observance of internationally recognized human rights by all countries.
>
> (2) Except under circumstances specified in this section, no security assistance may be provided to any country the government of which engages in a consistent pattern of gross violations of internationally recognized human rights. . . .
>
> (3) In furtherance of paragraphs (1) and (2), the President is directed to formulate and conduct international security assistance programs of the United States in a manner which will promote and advance human rights and avoid identification of the United States, through such programs, with governments which deny to their people internationally recognized human rights and fundamental freedoms, in violation of international law or in contravention of the policy of the United States as expressed in this section or otherwise.

230. Matheson, supra note 208, at 207.

See also generally Cohen, Conditioning U.S. Security Assistance on Human Rights Practices, 76 Am. J. of Int'l L. 246 (1982); Moeller, Human Rights and United States Security Assistance, 24 Harv. Int'l L.J. 75 (1983).

231. Other issue-specific restrictions have a much narrower focus, such as arrears on debt to the United States, expropriations of U.S. property, and nuclear transfers.

232. See 22 U.S.C. § 2370(f) (prohibition on assistance to communist countries).

233. See 22 U.S.C. § 2371 (prohibiting assistance to governments providing sanctuary to terrorists).

234. Such countries include Cuba, Nicaragua, and Libya. Other examples include Angola, Cambodia, Laos, Vietnam, Syria, Iraq, and South Yemen.

235. Some of the specific provisions are found in the general legislation already discussed. Other examples appear in annual and supplemental appropriations acts, and in the various International Security and Development/Assistance Acts.

236. Such legislation presently affects El Salvador, Argentina, Bolivia, Chile, Guatemala, Haiti, Paraguay, Peru, and Uruguay.

237. Many of the restrictions on aid to these countries arose in response to the American public concern over repression within those countries. For a review of conditions under the closed political systems of individual Central American countries and the impact of U.S. assistance, see the Kissinger Commission Report, supra note 170, at 27-39.

238. See Matheson, supra note 208, at 207-08.

239. Matheson, The Role of the Reagan Administration, 9 GMU L. Rev. 21, 22 (1986).

240. Id.

241. A symposium held at Tufts University in March 1988 was conducted to study the specific subject of covert activities as they relate to law and government.

For a thorough analysis of covert activities in relation to democratic government, see generally G. Treverton, Covert Action: The Limits of Intervention in the Postwar World (1987). On the historical role of the military departments and the Central Intelligence Agency in covert actions, see generally J. Prados, President's Secret Wars: CIA and Pentagon Covert Operations Since World War II (1986).

242. Treverton, Covert Action and Open Society, 65 Foreign Aff. 995 (1987).

The practice of covert action, of course, goes back much further, including a National Security Counsel plan in 1948 originated by George Kennan that is considered the turning point for covert actions as used by the United States today. NSC 10/2, known as the "X" article, outlined a plan of containment that authorized a broad range of covert activity. Among the numerous authorized actions were support to resistance movements, guerrillas, refugee liberation groups, and support of indigenous anti-communists. Id. at 996.

243. Faculty member of the John F. Kennedy School of Government and former member on the First Senate Select Committee on Intelligence (the Church Committee) from 1975-76.

244. Id. at 1004, 1009. Treverton suggests that policymakers in deciding whether to use covert action in pursuit of a particular policy objective should consider three broad questions. First, can the operation bear the possibility of disclosure? One important signal is whether the covert policy contradicts U.S. open policy, as with the sale of arms to Iran. Second, are the risks involved in disclosure worth the limited objectives attainable due to the necessity of conducting a small operation? Third, what message and to whom do we intend to communicate through the covert action, considering our inability to ultimately control the acts of those receiving aid. Id. at 1009-11.

245. Gates, The CIA and Foreign Policy, 66 Foreign Aff. 215, 225 (1987). Robert Gates, from his vantage point as Deputy CIA Director, observed that, as a result of Congressional oversight, the CIA finds itself "involuntarily poised nearly equidistant between the executive and legislative branches." Id.

But see generally Lobel, Covert War and Congressional Authority: Hidden War and Forgotten Power, 134 U. Pa. L.

Rev. 1035 (1986). Professor Lobel argues that Congress needs to exercise more of the powers reserved to it under the Constitution by acting more aggressively than it has been. He states that Congress must control more effectively covert activity authorized by the executive branch, which is carried out by intelligence agencies in a way that threatens to draw the United States into undeclared wars.

246. Case-Zablocki Act of 1972, 1 U.S.C. § 112b (1982) [hereinafter the Case Act]. The Department of Defense implementation of the Case Act is found in Dep't of Defense Directive No. 5530.3, International Agreements (June 11, 1987).

247. The primary legislation governing congressional oversight of covert operations is the Hughes-Ryan Amendment of 1974, as amended by the Intelligence Oversight Act 1980. Hearings held by the House Committee on Intelligence began in April 1987 to consider requiring prior notice of covert actions to Congress. See generally, H.R. 1013, H.R. 1371, and Other Proposals Which Address the Issue of Affording Prior Notice of Covert Actions to the Congress: Hearings Before the Subcommittee on Legislation of the Permanent Select Committee on Intelligence, House of Representatives, 100th Cong., 1st Sess. (1987).

Hearings were held in November 1987 by the Senate Intelligence Committee on three similar bills correcting perceived deficiencies in the oversight of intelligence and covert action. The legislation included a provision that would have required all covert operations be reported to Congress within 48 hours. See Christian Sci. Monitor, Nov. 13, 1987, at 1, col. 3. The Senate passed its version of the 48-hour notice provision on March 15, 1988, by a margin sufficient to override a threatened veto. Wash. Post, Mar. 16, 1988, at A1, col. 1.

The Reagan Administration had vigorously opposed the legislation, citing the need to withhold disclosure where lives were at risk. It was also pointed out that the initiation of

regular covert operations, such as the CIA support of Nicaraguan and Afghan rebels, normally have been reported to the Congressional committees. See Wash. Post, Dec. 17, 1987, at A8, col. 1.

248. See Further Continuing Appropriations Act for 1983, § 793, 96 Stat. 1830, 1865 (1982) [hereinafter Boland Amendment].

249. See International Security Assistance and Development Cooperation Act of 1980, § 118, Pub. L. 96-533, 94 Stat. 3131 [hereinafter the Clark Amendment].

250. See generally Smith, Trap in Angola, 62 Foreign Pol'y 61 (1986) (arguing that U.S. covert aid to the Angolan resistance actually caused the reverse of the intended effect by instigating greater Soviet and Cuban military support for the Angolan government).

251. See 22 U.S.C. §§ 2318, 2364, and 2348A.

252. See 22 U.S.C. § 2776(b).

253. See, e.g., U.S. Troops Ordered to Honduras in Response to Nicaraguan "Invasion", Wash. Post, Mar. 17, 1988, at A1, col. 4 (quoting senior administration officials who described the order as part of an "emergency deployment readiness exercise" in which troops would not be used in combat).

254. The deployment of U.S. troops to Honduras was ordered by the President "as part of a broad understanding with Honduran leaders to take swift military action against Sandinista forces engaged in battle with Nicaraguan rebels along the Honduran border." Wash. Post, Mar. 18, 1988, at A1, col. 2 (citing an unnamed administration source).

255. See supra pp. 4-9.

256. See Comp. Gen. Dec. B-213137 (22 June 1984); Comp. Gen. Dec. B-213137 (30 Jan. 1986).

257. 31 U.S.C. § 1535 (1982 & Supp. III 1985). The Economy Act permits transfers of goods or services between federal agencies on a reimbursable basis.

258. Pub. L. No. 98-473, §§ 101(h), 8103; 98 Stat. 1837, 1942 (1984).

The Department of Defense Authorization Act of 1986 provided permanent authority or humanitarian and civic assistance in conjunction with military operations by adding a separate chapter to Title 10.

This act also provided the Department of Defense with limited authority to transfer to the Department of State nonlethal excess supplies for humanitarian relief purposes. Nonlethal excess supplies includes property, other than realty, "that is not a weapon, ammunition, or other equipment or material that is designed to inflict serious bodily harm or death." See 10 U.S.C. § 2547 (Supp. IV 1986).

259. This connection between the social and economic conditions in Central America and insurgency was a major theme of the Kissinger Commission Report's recommendations on U.S. military and economic assistance in the region. See supra note 170.

260. Wash. Post, Feb. 4, 1988, at A1, col. 5. The request was for $36.2 million in additional money. More than $200 million in direct aid already has been provided. Of the new amount requested, $32.6 million was designated for items other than weapons and ammunition. Included in the amount for items other than arms aid, $7.2 million was intended as humanitarian assistance, including food, medicine, shelter, and clothing. The balance of the $32.6 million was intended for what was referred to as "nonlethal aid," which included items that could be used for combat such as jeeps, helicopters, and maintenance parts. See id.

261. Wash. Post, Mar. 4, 1988, at A1, col. 6.

262. Id. In an ironic twist, Democratic liberals and Republican conservatives combined their efforts to defeat the proposal. Those Democrats had consistently opposed any kind of assistance to the contras. The Republicans, however, apparently voted against the diluted aid package fearing that passage of the bill would provide an easy excuse for the

other members of Congress not to vote in favor of additional military assistance for the contras.

263. See Wash. Post, Mar. 25, 1988, at A29, col. 5. Congress subsequently passed a $47.9 million humanitarian aid package for the contras, which President Reagan signed on April 1, 1988. Wash. Post, Apr. 2, 1988, at A16, col. 1.

264. Id. at A1, col. 2.

265. Id. at A29, col. 5.

266. Id. at A1, col. 6.

267. Wash. Post, Mar. 17, 1988, at A36, col.1.

268. Id.

269. The most recent humanitarian assistance package for the Nicaraguan resistance also provided $17.7 million for medical treatment of children of both sides who have been wounded in the conflict. Wash. Post, Apr. 1, 1988, at A4, col. 1.

270. U.S. efforts to help resettle the estimated five million Afghan refugees is being planned, according to Secretary of State Shultz, but may be impaired by current budget cutbacks. Wash. Post, May 7, 1988, at A17, col. 1. Afghan refugees in Pakistan constitute the single largest group of refugees in the world. Karp, War in Afghanistan, 64 Foreign Aff. 1026, 1044 (1986). See also supra note 255 and accompanying text.

271. Tonelson, The Real National Interest, 61 Foreign Aff. 49 (1985-86).

272. Weinberger, U.S. Defense Strategy, 64 Foreign Aff. 675-77, 689-90 (1986).

273. Id. at 678.

274. Id. at 685-87. See also Address by Caspar W. Weinberger, National Press Club (Nov. 28, 1984), reprinted in The Uses of Military Power, Defense, Jan. 1985, at 2.

275. Id. at 689.

276. Address by Secretary of State George Shultz, 1984 Conference of the Trilaterial Commission, quoted in Tonelson, supra note 271, at 61-62.

277. Id. at 62. See also Shultz, New Realities and New Ways of Thinking, 63 Foreign Aff. 705 (1985).

278. Van den Haag, The Busyness of American Foreign Policy, 64 Foreign Aff. 113, 117 (1985).

279. See, e.g., Layne, supra note 189, at 80.

280. Solarz, When to Intervene, 63 Foreign Pol'y 20-21 (1986).

281. Id. at 21.

282. See id. at 22.

283. Id. at 37, 39.

284. See supra note 211 and accompanying text.

285. Vance, supra note 196, at 8.

286. Id. at 25.

Cf. Armitage, Tackling the Thorny Questions on Anti-Communist Insurgencies, Defense, Oct. 1985, at 15. Deputy Assistant Secretary of Defense Richard L. Armitage named the following similar considerations, which he called "working guidelines," to determine the nature and extent of U.S. support to insurgents:

1. Whether the insurgents are worthy of support, in that their success would be preferable to the regime in power;
2. Whether the aid should be overt or covert;
3. Whether the aid is suitable to meet the insurgents' needs, in terms of being timely, adequate, and reasonably expected to continue;
4. Whether the aid will enhance broad U.S. security interests, including the impact on East-West relations; and,
5. Whether the aid can be provided in concert with friends and allies.

Id. at 17-20.

287. Id. at 26-36.

288. See Tonelson, supra note 271, at 72.

289. Layne, supra note 189, at 87. See also Tonelson, supra note 271, at 70-72. Tonelson stated that, in regions of secondary interest, Americans have much greater policy

latitude to identify those conflicts that are appropriate for what he referred to as "benign neglect." Id. at 64.

290. Member of the National Group of the United States in the Permanent Court of Arbitration in The Hague.

291. See Cutler, The Right to Intervene, 64 Foreign Aff. 96, 109-11 (1985).

292. See generally, Oliver, 1 Am. U.J. Int'l L. & Pol'y 57 (1986). Professor Oliver criticized the "minimalist place" assigned to international law by diplomats, particularly George F. Kennan. Oliver said Kennan's writings address only the role that national interests and morality play in international relations. But Oliver also recognized that "(a) gulf exists between international legal scholars in their closets on the one hand and real world needs and challenges to legal order on the other." He in part attributed this "decline of international law as a factor of weight in foreign relations" to what he referred to as widespread "systemic complacency." Id. at 59.

Cf. Kennan, Morality and Foreign Policy, 64 Foreign Aff. 205 (1985-86).

293. Reisman, supra note 97, at 285.

294. Id.